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THE PROVINCE OF JURISPRUDENCE REDETERMINED

(*Concluded*)*

IV. Towards a Twentieth Century Triology

JURISPRUDENCE in effect, wrote the late Professor Vinogradoff in 1920, must face the problems of law in its own way by such help as it can derive from those branches of special knowledge which have a direct bearing on legal questions.[82] He then devoted four chapters to the topics: "Law and Logic," "Law and Psychology," "Law and Social Science," and "Law and Political Theory," indicating some of the possible inter-actions under each respective head.[83]

Two assumptions behind this treatment seem to the writer to provide the nearest approach to a satisfactory basis for redetermining the province of jurisprudence in the twentieth century. They are: first, that jurisprudence is the examination of law in the light of other disciplines than the law;[84] and second, that jurisprudence must make its own classification for legal purposes of the fruits of such examination.

* The first part was published in the last number, pp. 97–112

[82] *Historical Jurisprudence*, 1920, 5.

[83] *Ibid.*, 1–95. *Cf.* the approach within the sociological field in Cairns, *Law and the Social Sciences*, 1935, and the Introduction thereto by Roscoe Pound, at xiv.

[84] Bentham (*Principles of Morals and Legislation*, 1879, 323) spoke truer than his own development of his words would indicate when he said: "Jurisprudence is a fictitious entity; nor can any meaning be found for the word but by placing it in company with some word that shall be significative of a real entity." The above criterion completes the description and, it is submitted, gives an answer to Dr. C. K. Allen's apparent view ("Jurisprudence—What and Why," in *Legal Duties*, 12 ff. (1931)) that there can only be one branch of jurisprudence and that adjectives are out of place, since you cannot separate "the kinds" of jurisprudence until the "jurisprudence" itself is isolated. By the above definition jurisprudence is isolated. But from the very terms of the definition it is apparent that it can have no existence apart from its various branches.

A. Jurisprudence is the Examination of the Law in the Light of Other Disciplines

Jurisprudence, in the present writer's hypothesis, is the lawyer's extroversion. It is the lawyer's examination of the precepts, ideals, and techniques of the law in the light derived from present knowledge in disciplines other than the law. It is an attempt, which must always remain imperfect, to fulfil for the law the object strikingly posed by the late Mr. Justice Holmes of showing "the rational connection between your fact and the frame of the Universe. To be master of any branch of knowledge you must master those which lie next to it."[85]

On the one hand, all the major branches which are generally admitted to the halls of jurisprudence are admissible by this test. Analytical jurisprudence is admissible as essentially a critique of law in terms of logic.[86] With great respect to one of the greatest of lawyers, the solvent it uses

[85] "The Law as a Profession," 20 *Am. L. Rev.*, 741, 742 (1886). This may be viewed as an extension beyond its own field of the definition given to sociological jurisprudence, e.g. in Kantorowicz, *Rechtswissenschaft und Soziologie*, 1911, as a survey of the relation between law and other social spheres. *Cf.* Timasheff, "What is Sociology of Law," 43 *Am. Jo. of Sociology*, 228 ff. (1937).

[86] This is so whether the insular (particular) or the universalist (*2 Lectures on Jurisprudence*, 3rd ed., 1107) trends in Austin and his followers is regarded; whether the system produced be that of a Holland, requiring new editions with each important change in the law, or that of a Kelsen, a Hohfeld or a Kocourek, whose systems aspire to validity independent of the state of the law to which it may be applied. For a discussion of the distinction in the English literature see Allen, "Jurisprudence—What and Why?" in *Legal Duties*, 5–11 (1931). This definition is implicit throughout Austin's work, but it is strange how rarely he is explicit on the matter. See, however, his consideration of it in *2 Lectures*, 3rd ed., 1122–1123, where appropriately enough he draws comfort from Leibniz: "With regard to lawyers in particular . . . the study of the rationale of law is as well (or nearly as well) fitted as that of the mathematics to exercise the mind to the mere process of deduction from given hypotheses." It is too clear to warrant citations for modern analytical writers, who even when like Kocourek, they arrogate the adjectives "legal" or "juristic" to their analysis, mean simply "logical." The rendering explicit of this nature of analytical jurisprudence in Holland and Salmond is what really seems to be troubling Professor A. H. Campbell, "A Note on the Word 'Jurisprudence,'" 56 *L.Q.R.* 334–339 (1942). The distinction between "legal exposition" and "analytical jurisprudence" which the learned writer seeks to make by the terms "practical study" and "theoretical inquiry" is, it is submitted, only possible on this basis. See also Kocourek, "Classification of Law," 11 *N.Y. Univ. L. Qu. Rev.*, 319, 322 (1934). Insofar as Pollock, *The Methods of Jurisprudence, loc. cit., supra*, p. 110, n. 60 seems to negative the view in the text, it is submitted that thought in the field of logic and the law since 1882 has not supported that lamented and distinguished writer. So also it is submitted that Hohfeld's assumption (*Fundamental Legal Conceptions*, 1923, 351) that whereas the test of logic applied by analytical jurisprudence is "intrinsic" to the law, while that of teleology is extrinsic to the law, is surely not tenable to-day. In one way, both logic and ethics are intrinsic to the law: in another they both are extrinsic. But in no way can one be intrinsic and the other extrinsic. The followers of Kelsen clearly recognise that the logic they use in their "science" is extrinsic to the law itself. See J. W. Jones, *Historical Introduction to the Theory of Law*, 1940, 232. It is obviously only the syllogistic logic which bears this relation to analytical jurisprudence. The newer so-called "experimental," "non-Euclidean" or "non-Aristotelian" logics (see for brief statements, John Dewey, "Logical Method and Law," 10 *Cornell L. Qu.* (1924), in Hall, *Readings*, 343 ff., and M. R. Cohen, "The Place of Logic in the Law," 29 *Harv. L. Rev.*, 622, 636 ff. (1916)), since they derive their conclusions and their premises from existential and ideological factors extraneous to the assumed body of propositions, do not give rise to analytical jurisprudence. Their importance is rather as a description of the synthesis of syllogistic, empirical and

is "logical," not "cynical," acid. The "logical form" is not "fallacious" within its own proper universe of discourse.[87] Historical jurisprudence is admissible insofar as it purports to interpret the development of law in terms of the theory of history. Also on this test sociological jurisprudence is clearly not misnamed, for it reviews the law in the light of sociological knowledge, however that be defined. And insofar as economics, psychology, anthropology, and the rest be regarded as disciplines distinct from sociology, they may each properly be credited with a respective approach to jurisprudence. The same is to be said of philosophy in its various branches, including notably the normative branches of ethics and politics.[88]

On the other hand, the various branches excluded from jurisprudence, by a consensus clearer than the reasons basing it, are justifiably excluded on this test. Thus the rebukes heaped upon "medical jurisprudence," "dental jurisprudence," and "equity jurisprudence,"[89] are shown by this test to be justified by reasons other than the juristic *ipse dixit*.[90] "Equity jurisprudence"[91] is not jurisprudence for the reason that it is merely an exposition of a branch of the law by the measure of the lawyer's own yardstick.[92] On the other hand, what is called "medical jurisprudence" does not merit the name, because it is not an examination of the law in the light of medicine, but a mere extraction from the law of those parts useful for a medical man to know. It does nothing to or for the law which it abstracts.[93] So again this hypothesis gives a satisfying account of the problem whether historical jurisprudence is to be distinguished from legal history. The answer turns upon the nature of the historical discipline itself. Insofar as history is only the recording and recounting of events, there can be no historical jurisprudence, but only legal history. For the law is then not examined in the light of history: it merely constitutes

ideological techniques involved in the actual process of deciding cases or making laws. It is a matter for great admiration that the late Dr. Edward Jenks was able to devote a chapter to the nature of analytical jurisprudence without once referring to "logic" of any kind (Jenks, *The New Jurisprudence*, 1933, Chap. II).

[87] See Holmes, "The Path of the Law," 10 *Harv. L. Rev.*, 457, 468 (1897).

[88] See however *infra*, p. 184 *et seq.*

[89] See e.g. Holland, *op. cit.*, 13th ed., 4; Keeton, *op. cit.*, 2.

[90] Thus the only reason Holland offers as to equity jurisprudence is that "an exposition of existing law is quite another thing from a science of law" (p. 5). The stricture on "medical jurisprudence" is usually made without reason (see e.g. Keeton, *op. cit.*, 4; Holland, *op. cit.*, 5n, who at the same time smites "architectural," "dental," and "ophthalmic" jurisprudence); or with only question-begging reasons, for instance, that it is not "scientific" (Gray, *Nature and Sources of the Law*, 1909, Chap. VII).

[91] See e.g. Ames, *Equity Jurisprudence*. As has frequently been pointed out, this would perhaps be the only proper use in the original Roman sense of *jurisprudentia*. With respect, however, the writer would disagree with Professor Keeton's proposition (*op. cit.* 2) that its use in this sense to-day is intrinsically right though historically wrong. It is surely rather intrinsically wrong though historically correct for a former time. See on this literary question, which, however, seems of slight importance, A. H. Campbell, in 56 *L.Q.R.* 334 (1942).

[92] *Cf.* almost the same point in M. R. Cohen, *Law and the Social Order*, 1933, 243.

[93] There might, indeed, be "equity jurisprudence" and a "medical jurisprudence" in the true sense. A study, for instance, of the effect of gout upon the exercise of the Chancellor's discretion in the seventeenth and eighteenth centuries would be both. *Cf.* by analogy, Zinsser, *Rats, Lice and History*, which deserves on the same principle the title of medical sociology.

some of the events which make up the historian's narrative or description.[94] It is the law examined in time-sequence, rather than in logical sequence: but in any case it does not merit the title of jurisprudence. Insofar, however, as history is a synthesising and interpretative discipline, the application of its discoveries and generalisations to law clearly merits the title "Historical Jurisprudence." For it adds arrangement and meaning to the bare facts of law narrated in time sequences.[95]

If the above claims are just it will be readily seen why past disputations as to the claims of the science of legislation, historical jurisprudence, psychological jurisprudence and others to the "quadrisyllabular compliment," yield much heat and little light. For in the absence of an adequate criterion, such as that tacitly assumed by Vinogradoff, the ejection of some claimants and the admission of others could only be on the basis of the doorkeeper's "hunch."

B. The Branches of Jurisprudence are to be Ascertained by Classifying for Legal Purposes the Results of this Examination

To confirm the admission to jurisprudence of the reflections upon law from the several bodies of knowledge above indicated, is not to admit the propriety of dividing jurisprudence into as many corresponding branches. In other words, it does not follow from the endorsement of the claims of analytical, historical, philosophical, sociological, psychological jurisprudence, and the others that each of them represents a separate branch of jurisprudence.[96]

At this point it is important to say that the question of classification of the branches of jurisprudence is not a matter of logic merely. Several different classifications may, as a matter of logic, be equally satisfactory. The more crucial question is whether the classification adopted is such as to permit coherent exposition, free of excessive duplication, or atomisation, and in a manner relevant to the problems which are to face the student in the world he enters.[97]

It is for these reasons that it is necessary to reject forthwith a classification of jurisprudence which would devote a separate branch to each

[94] *Cf.* J. Michael and M. J. Adler, *Crime, Law and Social Science*, 1933, 55.

[95] Due reservations are made as to whether the two activities are really severable in kind, on which matter this is not the place to enter. See, however, Allen, *Legal Duties*, 13 (1931).

[96] It will be clear, therefore, that the writer would not regard the division of Vinogradoff's above cited chapters, or of Cairns, *Law and the Social Sciences*, 1935, as in any way definitive. There is thus no inconsistency between the present thesis and the call for correlation of law with the social sciences generally. So the writer would agree, for instance, with E. T. Mitchell, "Social Ideals and the Law," 46 *Philosophical Review*, 113 (1937) that "the law needs philosophy to restore itself that direction, clarification, and background which it appears to have lost"; but at the same time he would suggest the abandonment of the separate category "philosophical jurisprudence."

[97] At the risk of its other edge being turned against us by the surviving Austinians we might quote in support, Austin, 2 *Lectures*, 1124, Campbell's ed.: "He who would know anything well, must resolve to be ignorant of many things." Of course in learned writing as distinct from pedagogy the unintegrated approach has an important role. See e.g. for English law, D. Hughes Parry, "Economic Theories in English Case Law," 47 *L.Q.R.* 183 (1931); W. Robson, "Legal Conceptions of Capital and Income," *London Essays in Economics*, 251 ff.

of the external disciplines which is to be applied to the law. Such a classification would perpetuate overlapping and atomisation. Moreover, on such a basis the point may well quickly arrive when, as a matter both of logic and convenience, jurisprudence would be better considered as a mere aggregation of branches from the respective external disciplines. Logic, history, sociology, ethics, political philosophy, political science, epistemology, aesthetics, economics, psychology, ethnology, anthropology, geography and sociology would each simply include within itself a chapter on law.

The inconvenience for the law student of such an outcome is patent. It would require him to master each external discipline as a whole before being introduced to its reflections on the law. However desirable, that is clearly an impossibility. Further, such a disintegration of jurisprudence would not be welcomed by workers in the external disciplines concerned. It has been pointed out that the relation between law and outside disciplines is by no means a one-sided one;[98] that, for instance, political scientists and philosophers are having increasing resort to legal concepts and institutions for assistance within their own fields. The surrender of the identity of juristic activity would tend to destroy a source of instruction which may be as important, for instance, for the political philosopher as political philosophy is for the lawyer.

If this complete disintegration is not to take place consistently, a partial and unreasoned disintegration is also to be avoided.[99] Jurisprudence, for its own purposes, must find its own categories. Then, bearing in mind throughout that it is dealing with reflections from external disciplines upon the law, it must arrange those reflections under its own categories.

C. The Three Branches of Jurisprudence

The proposal now to be made is of an elementary nature. It is made with the diffidence fitting for any new comment on a problem to which distinguished minds have repeatedly addressed themselves. The writer only ventures to make it because of the importance which this problem has for the future of jurisprudence.

It has already been observed that the lag between the present social environment and jurisprudence as taught, is not due to the lack of scholarly interest in twentieth-century legal problems. On the contrary, these problems have, for three generations, engaged some of the ablest minds; and a formidable volume of literature is already in existence. It is the lag between scholarship and pedagogy which breaks the chain. In the writer's view this lag between scholarship and pedagogy is largely due to the

[98] *Cf.* Jones, *Historical Introduction to the Theory of Law*, 208–209 (1940); E. T. Mitchell, "Social Ideals and the Law," 46 *The Philosophical Review*, 113 (1937).

[99] Thus, while the work of J. W. Jones (see e.g. his *Historical Introduction to the Theory of Law*, 1940, and his "Aims and Methods of Legal Science," 47 *L.Q.R.*, 62 (1931), is, with respect, an important contribution to juristic scholarship in the non-analytical field, it faces the gravest difficulties for use in the reaching of jurisprudence because of this partial disintegration. Thus in the last-mentioned paper, Kelsen's work is discussed in the apparently same universe of discourse as that of Stammler, Kohler, and other writers devoted to teleological jurisprudence (see esp. 84 ff.).

absence of adequate textbooks of the new scholarship; and no adequate textbook is possible until an effective framework is found.

To meet this need it is suggested that a twentieth-century course in jurisprudence ought to have the three following main branches[100]—

(1) *Analytical Jurisprudence*.[101] This would largely conform to the traditional subject of that name, but its limited nature should be recognised. It is merely an inquiry into the *logical* interrelations of legal precepts and conceptions with a view to ascertaining what axioms will permit them

[100] *Alio intuitu* the division "pure theory of law," "sociology of law" and "philosophy of justice" has been clearly made by Kelsen. See e.g. the recent incidental statement in Kelsen, "Pure Theory of Law and Analytical Jurisprudence," 55 *Harv. L. Rev.*, 44, 54 (1942). This is substantially the division here adopted: though Kelsen makes it in order to exclude the two latter from the field of jurisprudence; the present writer, in order to regularise and consolidate the place of all three. It is quite apparent that Kelsen's object in making this distinction is to discredit sociological jurisprudence and teleological jurisprudence as fields of juristic study. See e.g. his language in "The Pure Theory of Law," 50 *L.Q.R.*, 474, 480, 483 (1934).

[101] This would constitute a "rational science" of law in the terminology of Michael and Adler, *Crime, Law, and Social Science*, 1933, xi. *Cf.* Adler, "Law and the Modern Mind: A Symposium," 31 *Col. L. Rev.*, 91, 102 ff. As to the wider meaning of logic, see *supra*, p. 178, n. 86. Broadly, such an examination might be unitary and universalist as seeking one single set of premises from which by formal logic a single framework applicable to any legal system might be deduced; or it might be pluralist and particularist as seeking merely those premises which are useful as a framework for the contents of a given body of law or part thereof at a given time. Kelsen, Kocourek, Hohfeld, Roguin and Austin (only occasionally, as when he speaks of "necessary conceptions" and principles "common to all systems" in *2 Lectures*, 3rd ed., 1107) aspired to the former. Austin (in most of his work) and Holland and Salmond throughout aspired only to the latter. It is only as to the latter that it is correct to say with M. J. Adler ("Law and the Modern Mind: A Symposium," 31 *Col. L. Rev.*, 91, 104 (1931)) that "the logical structure of law in discourse is pluralistic; the law as a body of propositions is an aggregate (not a system) of partially incompatible and diverging theories or doctrines. They are like so many different postulates and their derivative theorems, related as alternative analyses of the same subject-matter." *Cf.* Pound, "Classification of Law," 37 *Harv. L. Rev.*, 933, 939 (1924): "One may have in view a system of analytical jurisprudence—a universal analytical scheme of all law. But such a classification is not of necessity the best arrangement of an actual body of law. . . ." For further refinements see *ibid.* The most explicit elaboration of the tasks of analytical jurisprudence of the particular kind is, in the writer's opinion, Cassius J. Keyser, "On the Study of Legal Science," 38 *Yale L. Jo.*, 413 (1929): "(1) To detect and list the terms actually employed . . . as primitives (axioms). (2) To detect and list terms ostensibly defined and to examine the definitions with reference to their clarity, precision, and general availability. (3) To detect and list the propositions actually employed as primitive propositions or postulates. (4) To detect and list the propositions ostensibly proved or deduced and to scrutinise the proofs for their logical soundness or unsoundness. (5) To determine what terms it would be most expedient to select for use as primitives. (6) To construct the most available definitions of all other important terms by means of the primitives. (7) To determine what propositions it would be most expedient to select as primitive propositions or postulates. (8) To deduce all other propositions logically from the postulates." With great respect it is better to avoid such metaphors as "the chemistry of law," "the pure mechanics of law," "the anatomy of law," "osseous framework" and the decomposition of "premises . . . into their final atomic elements" (Kocourek, *Introduction to the Science of Law*, 1930, 21, 26) or "the grammar of the law" (Holland, *Jurisprudence*, 7th ed., 7), or "the map of a body of law" (2 Austin, *Lectures*, 3rd ed., 1117), or "the anatomy and physiology of law" (Hearn, *Legal Duties and Rights*, 1882, 5).

to be viewed, partly or wholly, as a logical self-consistent system.[102] It has been well described as "the logic of the law."[103]

(2) *Sociological (or Functional)*[104] *Jurisprudence*.[105] This would be devoted to observing and interpreting and generalising upon the effect of law upon men and of men upon law. It would be somewhat narrower than the programme of "the sociological school" of Roscoe Pound, for that programme generally includes within itself a theory of the purpose of law as well.[106] It would be somewhat broader than "sociological jurisprudence" as recently determined by Dr. S. N. Timasheff, since it includes the

[102] The co-ordinate character of the analytical and sociological branches was clearly asserted by Ehrlich nearly two generations ago (*Grundlegung der Soziologie des Rechts*, 1913, 384 ff.; Moll's transl., *Fundamental Principles of the Sociology of Law*, Chap. XX). *Cf.* Hohfeld's "functional" jurisprudence (*Fundamental Legal Conceptions*, 1923, 357), which he would devote to "actual study of existing conditions . . . the accurate ascertainment of facts, . . . the compilation and publication of fundamental data and statistics, . . . drawing . . . sound conclusion from the latter. . . ." The effect of failure to distinguish this branch from the sociological has been responsible for at least one great controversy in American scholarship. See Jerome Frank, *Law and the Modern Mind*, 1930, notably its attack on the work of Professor Beale at 48–56, and *cf.* on this controversy M. J. Adler, *op. cit.*, 31 *Col. L. Rev.*, 91, 104 (1931): "There is no reason why there should not be a science of law in both of these two senses of the term: but the two sciences are quite different things. All the trouble comes from confusing them. The science of law as official action is an empirical observational science; it includes a study of sociological and psychological phenomena as well as knowledge of the law in the second sense. . . . None of its scientific propositions can be more than probabilities. . . . In this respect it is like any other empirical science. On the other hand, the science of law in discourse is a purely formal science, like mathematics: its subject-matter is entirely propositional: its only instrumentality is formal logic. It deals with certainties and nothing else. The contrast may also be put as one between the material aspect of correspondence or non-correspondence of legal propositions with what actually happens; and the formal aspect of the logical relations between the whole series of propositions." *Cf.* on the general distinction, Ritchie, *Scientific Method*, 1923, 9–14. So, in the writer's opinion, Goodhart's criterion in "Determining the *Ratio Decidendi* of a Case," 40 *Yale L. Jo.*, 161 (1930) is a contribution to analytical jurisprudence. His censure of Professor Oliphant's view that it is what the judge does and not what he says he does that matters, is however, an unwarranted attempt of the analyst to judge in the sociological field by the analytical standard.

[103] Kocourek, *Introduction to the Science of Law*, 1930, 26.

[104] See on recent usage, Timasheff, *op. cit., supra*, p. 111. F. S. Cohen, "The Problems of a Functional Jurisprudence," 1 Mod. L. Rev., 5–26 (1937).

[105] This would constitute the "empirical science" of law *par excellence* in the terminology of Michael and Adler, *op. et loc. cit. Cf.* Adler, "Law and the Modern Mind: A Symposium," 31 *Col. L. Rev.*, 91, 102 (1931).

[106] See e.g. Pound, *A Theory of Social Interests*, *loc. cit., supra*, at 44 (1921); and *cf.* an earlier statement of Mr. Justice Holmes subject to the same comment in "Law in Science and Science in Law," 12 *Harv. L. Rev.*, 443, 462 (1897). *Cf.* Stone, "A Critique of Pound's Theory of Justice," 20 *Iowa L. Rev.*, 531–550 (1935). The importance of separating so far as possible the observational from the teleological elements in "sociological jurisprudence" has been a main issue between Professor Pound and Professor Llewellyn. The writer is still of the view expressed in 1935 (20 *Iowa L. Rev.*, 531) as to the general relation between these thinkers. Professor Llewellyn's view on the present point is well expressed in his "Legal Tradition and Social Science Method—A Realist's Critique," in *Essays on Research in the Social Sciences*, Brookings Institution, 1931, 99–100, in Hall, *Readings*, 796: "A descriptive science in the social field is not enough. Yet without a descriptive science which describes we make no advance; and without keeping description uncontaminated by our desires and ideals we acquire no clean-limbed descriptive science. The facts which we must investigate begin in isolated observations as to occurrences, behaviour; where we can find such they take in recurrences, regularities, patterns, found in the behaviour." Elsewhere he speaks of splitting "Dean Pound's concept of social engineering into two

task of generalising as well as observing and interpreting in terms of causation.[107]

(3) *Theory of Justice (or Critical or Censorial or Ethical)*[108]

sub-concepts; guesses as to policy as to which he (the legal researcher) shares his skill with others, and legal engineering, in which he may hope to stand unchallenged and alone" (*Handbook of the Ass. of American Law Schools*, 1924, 38, in Hall, *Readings*, 1154). Professor Pound's proposition that the ideals of the actors as to what the law ought to do are a vital part of the observable facts is not inconsistent with this (Pound, "The Call for a Realistic Jurisprudence," 44 *Harv. L. Rev.*, 697, 700 (1931)). *Cf.* Morris R. Cohen, *Law and the Social Order*, 1933, 240–247, in Hall, *Readings*, 800 ff. The "is" and the "ought" referred to by Professor Llewellyn are those of the observers, not of the actors. And even as to the observers, he admits that the separation can only be "temporary" and "for the purposes of study" (Llewellyn, "Some Realism about Realism," 44 *Harv. L. Rev.*, 1222, 1236, 1237 (1931). With great respect for the distinguished protagonists, the controversy seems unreal insofar as it is concerned with the denigration of either the sociological or the teleological approach. Both are vital, especially for teaching purposes. Much of the problem arises from the fact that Pound's pragmatism involves sociological observation as a part of a process of valuation, even though he does not fall into the fallacy of Leon Duguit of identifying the facts observed with the criterion of values. See Stone, "A Critique of Pound's Theory of Justice," 20 *Iowa L. Rev.*, 53 (1935). *Cf.* on Duguit, J. W. Jones, *Aims and Methods of Legal Science, loc. cit.*, 72–73; Geny, 2 *Science et Technique*, 242 ff.; Duguit, *L'Etat de Droit Objectif et la Roi Positive*, 1901, 18–19. Professor Llewellyn's "lazy" language is an important contributing factor. Temporary separation for purposes of study in the above sense would be consistent with the derivation of law from the dual complex of ethics and power, and with the absence as yet of any social science dealing adequately with the complex as a unit. Moreover, even were Dr. Timasheff's "sociological law" more advanced, he himself admits that it would still need a supplementary discipline to evaluate the ultimate ends to be attained by law. *Op. cit, supra*, p. 111, n. 73. At this stage the most that can perhaps be aimed at is to ensure that the findings of "teleology" are constantly checked against those of sociological jurisprudence; and that the social phenomena to be investigated by the latter are chosen by reference to hypotheses which have relevance to informed teleological speculation. This would seem to be a proper application in the legal field of Professor M. R. Cohen's insistence on "the persistent confronting of the diversity of historical fact with critical judgments as to values" ("The Social Sciences and the Natural Sciences," in *The Social Sciences and Their Interrelations*, ed. Ogburn and Goldenweiser, 1927, 454, in Hall, *Readings*, 737). *Cf.* for this necessity for confrontation, N. S. Timasheff, *Introduction to the Sociology of Law*, 1939, 29–30, and Chapter XII, and in more general fields the main theses of works such as E. H. Carr, *Twenty Years' Crisis*, 1939; K. Mannheim, *Man and Society in the Age of Reconstruction*, 1940. Curiously, Hohfeld (*Fundamental Legal Conceptions*, 1923, 351–357) seems to contemplate not only a separate branch of 'teleological jurisprudence" but also the inclusion of proposals for law reform under his "functional" branch. *Sed qu.*

[107] Timasheff, *op. et loc. cit., supra*, p. 111. The writer ventures three reasons in support. First for a long time to come the generalisations of the "sociology of law" must be far more unstable than those of the modern natural sciences such as biology or even physics. Second, Dr. Timasheff does not appear to have answered the important point of Michael and Adler (*Crime, Law and Social Science*, 1933, xii): "If the empirical investigation of legal data ever becomes scientific in form (i.e. of sufficient general and analytical form, as distinct from merely descriptive) the results will necessarily be part of an established science, called either sociology or political science or by some such name. Legal institutions and processes (*qu.* social effect of and on such?) are not *sui generis*; they are like other social or political institutions and processes." Third, in any case, the learned writer's own division is directed essentially to long range research activity (see esp., p. 29); the present one to the needs of pedagogy at the present moment.

[108] For instances of these respective usages see respectively Keeton, *op. cit., supra*, p. 108, p. 2; Bentham, *Principles of Morals and Legislation*, 19–9 ed., Ch. XVII, XXI, 324[6] Salmond, *Jurisprudence*, 7th ed., 1924, 4. *Cf.* also "the science of legislation" (1 Austin, *Lectures*, 3rd ed., 177 and *passim*); "deontological jurisprudence" (Bentham), 'the philosophy of law" (*semble* in Hall, *Readings*, but see *infra*, n. 113).

Jurisprudence.[109] This branch would be devoted to an evaluation of the purposes which men have sought or may seek to achieve through law. It would include but transcend the traditional field of the theory of justice.[110]

I have deliberately avoided the invention of new terms. All of these terms are familiar; the scope of each is approximately agreed, and the propriety of their inclusion within the province of jurisprudence is generally, if not universally, accepted. The novelty lies in the present submission that everything of major significance within the accepted field of jurisprudence, under whatever name it now masks, falls naturally and without strain under one or other of the above divisions.

Thus psychological jurisprudence is clearly concerned with one aspect of the operation of law upon men and of men upon law. It is of little advantage and productive of some confusion to constitute it a separate

[109] Further definition is reserved, but Hohfeld's definition (*Fundamental Legal Conceptions*, 1923, 351) comes very close to the present intention: "the systematic testing or critique of our principles and rules of law according to the psychological, ethical, political, social and economic bases of the various doctrines and the respective purposes or ends sought to be achieved thereby." Some of the data on which it proceeds would consist of rational systems, e.g. of ethics or political philosophy; some would consist of the empirical materials derived from sociological jurisprudence. But all would be used, not necessarily to establish a rational system of purposes, but to test the validity of purposes actually pursued of rational systems by reference to each other and to the relevant social phenomena. Professor M. R. Cohen ("Law and Scientific Method," in *Law and the Social Order*, 1933, 234 ff., in Hall, *Readings*, 808–809) uses "normative" interchangeably with "teleologic." He includes under this, however, the inquiry whether and to what extent the purposes of the legislator have been attained. Insofar as those purposes are capable of discovery, the present writer would say that such an inquiry pertains rather to the sociology of law, or what Professor Cohen terms "legal sociology." It is an essential part of any inquiry into "the law in books and the law in action," than to the theory of justice as above defined." The "oughts" under which men purport to make law or submit to law are surely a part of any inquiry into the actual interaction of law and men. The present writer has already indicated that he does not believe that there is any substantial difference on this point between Professor Cohen and Professor Pound on the one hand, and Professor Llewellyn on the other. Inquiries into the "ought" to which actors (the actual legislators, judges, citizens, etc.) feel impelled to conform, and the degree of their conformity, are part of the data of sociological jurisprudence above defined. On the other hand, the assessment of these "oughts" in terms of ethical or other rational criteria by the observer (the legal researcher, the ideal legislator, the ideal judge or the ideal citizen) must be treated as a part of the distinct branch of teleology. It is to be noted that in the very essay cited, Professor Cohen shifts, apparently unconsciously. from "teleological" in the sense here criticised to that here adopted (see esp, 247). Yet the inquiry whether and how far the purposes which the Nazis sought to achieve by the Nuremberg laws were actually achieved, is obviously of quite a different nature from the inquiry whether those laws were in "the best interests of the community" (*ibid.*). The former is to be made by investigating the effects of the laws on Aryans and non-Aryans, and the effects of official and citizen attitude on the laws themselves. The latter calls for a critical examination of the purposes of the laws in the light of ethical or other rational criteria as to what are "the best interests of the community." The former is clearly an empirical discipline whether or not it be regarded as worthy of the name of "science.' The latter is primarily a rational discipline, though it should be constantly checked by reference to the empirically derived generalisations of the sociology of law.

[110] For modern use of "teleological jurisprudence" see Hohfeld, *Fundamental Legal Conceptions*, 1923, 351; Morris R. Cohen, *Law and the Social Order*, 1933, 241. And *cf.* the same writer's "The Social Sciences and the Natural Sciences, in Ogburn and Goldenweiser, *The Social Sciences and their Interrelations*, 1927, 446 ff., in Hall, *Readings*, 730 ff. "Normative" is sometimes used in this sense. See, e.g. M. R. Cohen, *Law and the Social Order*, 1933, 241, in Hall, *Readings*, 898.

division parallel in some way to analytical, or even sociological, jurisprudence. The case of "philosophical jurisprudence" is even more instructive. Inasmuch as philosophy includes logic and epistemology, it has produced theories such as that of Kelsen which are precisely of the analytical branch above defined.[111] Inasmuch as it also includes ethics and political philosophy, it has produced theories of what is just law, such as those of Rudolf Stammler, which fall precisely under the branch devoted to the theory of justice. Philosophically speaking, both Kelsen and Stammler are neo-Kantian. That description is entirely apt *quoad* philosophy. *Quoad* jurisprudence, however, the apparently common description is a snare for the law student,[112] who too often (be it acknowledged) must pick up his philosophy *ambulando*.[113]

Again, political science, or the collection and systematisation of knowledge concerning politically organised society, is traditionally a branch of philosophy. Yet clearly the branch of jurisprudence which will gain most from the impact of political science is that branch—the sociological—which deals with the interaction of law and men. No purpose is served by classifying it under a separate head of philosophical jurisprudence.[114] Conversely, political philosophy, or the study of the nature of the public

[111] *Cf.* the recognition of this affinity in Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 55 *Harv. L. Rev.*, 44, 54 (1942). See also Jones, *Aims and Methods of Legal Science, loc. cit., supra*, pp. 84–85. The close relation (some would say identity) between logic and epistemology strongly supports this classification of "the pure theory of law."

[112] See, for instance, the title of a recent work, N. Ebenstein, *Die Rechtsphilosophische Schule der Reinen Rechtslehre*, 1938. The danger is reduced if "Neo-Kantian" is qualified by "logicist." See e.g. Pound, "Fifty Years of Jurisprudence," *Journal of the Society of Public Teachers of Law*, 1937, 17, 26. But then after all the significant element from the legal point of view is the *logicism* and not the *Neo-Kantianism*. It is to be observed that Professor Pound generally classifies Kelsen with Austin and the analytical school.

[113] This is the writer's principal dissent from Professor Jerome Hall's recent classification (*Readings in Jurisprudence*, 1938). That learned writer (a former student) still takes "Philosophy of Law" as a main branch. He includes under it Historical Jurisprudence, despite Kantorowicz's telling point that Savigny's work was "chiefly a sociological description" ("Savigny and the Historical School of Law," 53 *L.Q.R.*, 334 (1937), quoted *ibid.* 106. *Cf.* Ehrlich, *op. cit., supra*, n. 5, at 474). For the most part, however, he seems to identify Philosophical Jurisprudence with what is here called Theory of Justice, and his work constitutes the nearest approach which has been found to the division which the present writer has advocated.

[114] As when Professor Pound speaks of a revival of "philosophy of law" as lying behind both the social-philosophical and the sociological trends in jurisprudence (Pound, "Fifty Years of Jurisprudence," *Journal of the Society of Public Teachers of Law*, 1937, 26). Or when *ibid.* p. 31 he suggests "three ways of organising legal materials: (1) to look for organising principles in history; (2) to work out organising principles by philosophical ideas; (3) given certain precepts to analyse the organising principles underlying them." *Cf.* his "Scope and Purpose of Sociological Jurisprudence," 24 *Harv. L. Rev.*, 591, 604 (1911), where he attributes to "the philosophical jurist" the study of "the *philosophical and* ethical bases of law" (italics supplied). The supporting citations do not limit the term to the teleological field; but Professor Pound's own subsequent treatment suggests such a limitation (pp. 606–607). So does the scope of his *Introduction to the Philosophy of Law*, 1922. Contrast Lasson, *System der Rechtsphilosophie*, para. 2, cited *ibid.* at 604: "The problem of the philosophy of law is to comprehend the existing law in its rational internal connection and its connection with the other orderings and phenomena of life." *Cf.* Timasheff, *Introduction to the Philosophy of Law*, 1939, 30: "The philosophy of law was and will probably remain the preliminary investigation of problems which are not yet mature for scientific solution." He then proceeds to speak of the evaluation of ends as one field of philosophy of law which will remain independent.

good, pertains to the theory of justice and must make its contribution in that place, and not under an omnibus head of philosophical jurisprudence.[115]

Perhaps the most radical effect of the present proposal upon current classification would be the disappearance of historical jurisprudence as a separate branch.[116] In the writer's view, insofar as historical jurisprudence inquires into "the historical origin and development" of the law, its institutions and doctrines,[117] it is of necessity but a part of sociological jurisprudence as above defined. This point was made long ago by the late Professor Kantorowicz concerning Savigny and his followers;[118] it is obviously the case for most of Maine's work. The separate identity of historical jurisprudence up to the present seems due to the fact that it appeared on the Continent early in the nineteenth century as a part of the romanticist revival and in reaction from the universalist and creative juristic thought of the preceding natural law period; whereas sociological jurisprudence only emerged clearly with the rise of the social sciences in the second half of the century as a reaction against the formalistic juristic thought of the analysts, and against the determinism whether ethical, idealistic, political, biological or economic which captured the historical school.[119] This order of appearance is no reason for keeping separate what functionally should be unified.[120]

It scarcely seems necessary to multiply examples further. It is believed that nothing of significance within the actual field of jurisprudence writing would be excluded by this simple division. Such a division would, on the other hand, conduce not only to clarity, but to a closer nexus between the teaching of jurisprudence and the main problems of the present age. It would conform too, so far as "sociological jurisprudence" is concerned, with the long advocacy of and the felt tendency towards correlation or "unification" of the social sciences.[121] And finally, it is believed that only some such simple re-arrangement of the field promises an escape from the present impasse, in which all branches of jurisprudence are treated as but ancillary to analytical jurisprudence.

[115] If the omnibus head of philosophical jurisprudence is to be maintained at all the only proper course would be as Dr. Allen has suggested (*Legal Duties*, 17) to hand it completely over to the respective philosophers, and retake from time to time such of their conclusions as are relevant to the problems of the law. But then at this point the partition proposed in the text would still have to be resorted to. Dr. Allen seems to stop half-way in his analysis on this point. See also J. W. Jones, *op. cit., supra*, p. 181, at 214–215, for some discussion of the relation between ethics and metaphysics, in nineteenth-century philosophy of law.

[116] The writer would respectfully agree in result, at any rate, with Dr. C. K. Allen (*Legal Duties* (1913), 13). He would agree also as to the similar disappearance of "comparative" jurisprudence as a separate category.

[117] Pound, *Outlines of Jurisprudence*, 1928 ed., 1.

[118] See *supra*, n. 113.

[119] *Cf.* Pound, *Interpretations of Legal History*, 1930, 12 ff.

[120] It is not surprising therefore that Dr. Robson's call for a revival of historical jurisprudence ("Sir Henry Maine To-day," in *Modern Theories of Law*, 1933, 179) reads more naturally as a call for a really active and comprehensive sociological jurisprudence. N. S. Timasheff's suggestion 143 *Am. Jo. of Sociology*, 235 (1937) that historical jurisprudence be maintained as a check upon sociological jurisprudence is open to the comment that what he really means is that sociological research should (and indeed how could it be otherwise?) continue to address itself to the phenomena of the past as well as the present. It does not warrant a separate branch of historical jurisprudence.

[121] See e.g. recently, K. Mannheim, *Man and Society in the Age of Reconstruction*, 1940, 27–32; Cairns, *Law and the Social Sciences*, 1935, 1–4.

V. The Relativity of Jurisprudence

The objection that would exclude from the sphere of jurisprudence all but "the formal science of positive law" has long since been answered,[122] and has been the subject of some comment in the foregoing pages. In those which follow it is proposed to deal with more serious objections to the threefold division of jurisprudence here proposed. These arise from certain questions in the relationship of jurisprudence to law, and to the social, economic, and political conditions underlying the law of a particular time and place.

They were formulated as long ago as 1917 by an American scholar[123] with an ingenuity and learning which commands attention still. He concluded his thesis as follows—

> In conclusion: There is a place for each school of jurisprudence in connection with the particular law out of which it grows, just as each grammar is fitted to the language that it best describes.[124] There are perhaps permanent and universal elements in grammar and in jurisprudence . . . but it is as unsatisfactory to teach English law with German jurisprudence as to teach the English language with German grammar. . . . The jurisprudence of modern American life has not yet been written, yet enough has been said and done to show that to represent the needs of our day it must deal with law in a manner that will do justice to the social changes and discoveries that lie immediately behind it. But in accepting the programme of the sociological jurist of the Constructive School for to-day, we do not close our eyes to what Dicey calls the "cross-currents from the past and future systems, that save us from the tyranny of ideas." Granted the predominance of a school to-day in America, we neither regret its absence in the past nor prophesy its continued endurance here or initiation abroad. May we not accept the doctrine of the relativity of jurisprudence?

And, kindly scoffing, he pitied the mind which should be asked to survey the branches of jurisprudence suggested by Hohfeld. "For the 'schools' are inconsistent with each other, sometimes consciously, sometimes unconsciously. They are the products of different times and places, and differ, not only in their points of view, methods and tendencies, but in their fundamental concepts, their problems and purposes—in a word, in the subject-matter of their studies."[125]

This would seem to negate in advance the possibility of any such threefold field of study as has been here proposed. For the suggestion is, as the writer understands it, that one branch of jurisprudence alone is appropriate to the major interests and needs of a particular age. The study of other branches will not be worthwhile so far as that time and

[122] See notably Sir Frederick Pollock, in "The Methods of Jurisprudence," 1882, in *Oxford Lectures*, 1890, 24 ff.; Vinogradoff, *Historical Jurisprudence*, 1920, 1–99; Maine, *Ancient Law*, 1861, Pollock's ed., 1916, 6–7; Maine, *Early History of Institutions*, Lectures XII, XIII (1874). Mr. Justice Holmes's position on the point needs no citation.

[123] Professor Nathan Isaacs, "The Schools of Jurisprudence," 31 *Harv. L. Rev.*, 373 (1917).

[124] Citing, curiously enough, Holland, *op. cit.*, Chap. I, which proceeds really on another ground.

[125] P. 375.

place is concerned. The wheel has thus turned full circle. Whereas the analytical jurists would deny place to any other branch but the analytical, this learned writer denies place for other than sociological jurisprudence. But there is a difference. The analysts tended to believe that their exclusive claim was valid for all times and places; this learned writer makes his claim only for twentieth-century America and readily admits that other times and places may properly indulge other tastes and interests.

This challenging conclusion loses some of its terrors when the supporting argument is examined.[126] It takes its starting point in an elaboration of Maine's observation that in time the devices of legal growth proceed in the order, Fictions, Equity, and Legislation. Each of these, said the writer,[127] is connected with a peculiar point of view resulting from the state of the law at the time; and the state of the law proceeds in great cycles. First, there exist a number of definite legal propositions, termed for simplicity, *Codification*. In this stage, the interests of the legal specialists are turned to word-study. "New cases, hard cases, can be met only by intensive word-study, perhaps by word stretching or legal fictions."[128] This produces the *Stage of Glossation* or Word Study and Legal Fictions. Next in reaction to this ("It matters little how it is brought about")[129] comes a stage of principle-study as distinct from word-study, of equity and natural law in Rome, in England, and on the Continent. This is the *Stage of Commentation* or Principle—Study and Equity. Finally, as the principles become exhausted there comes the *Stage of Conscious Modification* or of Legislation. The effect of this is to establish a new set of definite legal propositions and cause a return to the *Stage of Codification*. Whereupon the cycle begins again.

To this cycle of conditions of the law there corresponds, according to the learned writer, a cycle of jurisprudential approaches. With due allowance for the vagaries of time, place, and people, he submits that in the *Stage of Glossation* juristic activity is on its expository side *exegetical*, that is word-study and manipulation; and on its critical side *comparative*. So in the *Stage of Commentation* it is on its expository side *analytical*, studying logical principles, and on its censorial side *philosophical*, constructing ethical principles to which law should conform. Finally in the *Stage of Legislation and Codification* its expository jurisprudence, inspired by awareness of change, is *historical*, and its censorial jurisprudence is *constructive*, that is, directed to giving the power to change.

[126] All the more challenging, since it would appear to have been based on some suggestive generalisations in Pound, *The Scope and Purpose of Sociological Jurisprudence*, *loc. cit.*, *supra*, p. 186, n. 114. These, however, were rather incidental, and in any case were not pushed to anything like the point above indicated. That learned writer clearly recognised the concurrent relevance of all the approaches in the present age. See his *Fifty Years of Jurisprudence*, *loc. cit.*, *supra*, p. 107, n. 40. The present writer remains the more confident in his answer in remembering that the late Sir Frederick Pollock concluded a similar correlation of legal change and jurisprudential emphasis with the following words: "The prevalence of one or another method of jurisprudence depends in the first place . . . on the historical conditions of legal systems and institutions. But there is no reason why in England, Germany, or America, we should make ourselves the slaves of such conditions, or why one method should be cultivated to the exclusion of others" (Pollock, "The Methods of Jurisprudence," 1882, in *Oxford Lectures*, 1890, I, 19–36, esp. 34–35).

[127] *Op. cit.*, 378, summarising his article, "The Law and the Law of Change," 65 *Univ. of Pa. L. Rev.*, 665, 674–79, 748–763.

[128] P. 378.

[129] *Sed qu.*

The present writer would make several defences were this heavy barrage of the cycle theory turned upon the present proposal.

First, granting the validity of the theory, its learned proponent himself admits that, even when one school of jurisprudence dominates in response to its age, cross-currents of the other schools are always present. If this be so, then even on his own theory, the task would remain of providing in each age the necessary framework for understanding the more important approaches. Two of the branches which the present paper would preserve, the analytical and the theory of justice, are in some degree unavoidable at all periods. The third branch, which we have called the Sociological, is not clearly distinguished by the learned writer from the Teleological. But it is clear from the above extracts that he would not question its importance relatively to twentieth-century America or even England.

If it were necessary to take a further position, it would be submitted that the cycle theory of Professor Isaacs is twice vitiated. First, it proceeds on an assumption of the autonomous development of juristic techniques which is obsolete and inconsistent with modern sociological thought; second, the panoramic analysis of legal history by which it is supported is not convincing.

As to the first vice. The entire theory assumes that juristic thought varies with the law of the time and place. So far so good. But it also assumes that the law has a life cycle of its own. It is only by reference to the life cycle of the law that a cycle is imputed to jurisprudence; and only on such a basis could the learned writer illustrate (as he does) the stages of the life cycle from various systems of law, *without decisive reference to the social, economic and political characteristics of the time and place.* This is what is referred to as the assumption of the autonomous development of juristic techniques.

The assumption cannot be correct. If law has a life cycle it cannot be a self-determined cycle. For it is elementary doctrine of the social sciences that law is conditioned by the social, political, and economic environment as well as by human thought processes. And indeed that such thought processes themselves are largely conditioned by the same environment. It is boldness enough to correlate kinds of social, political, and economic conditions with stages of legal development. It is, however, in the nature of black magic to postulate an ever-recurring relation in a set order between kinds of law and kinds of jurisprudence, neither of which can claim title as an independent variable.

In view of the first vice, the second one consisting of weak demonstration, was to be expected. In the formidable sweep of history which he seeks to cover, it may well be that some weak links in the cyclical chain were inevitable. But the signs of strain go far beyond this, and cast the entire hypothesis into grave doubt. Some of them are enumerated in the footnote.[130]

[130] It is difficult, for instance, to follow the demonstration that Justinian's codification proceeded from a turbulent social change comparable to that in nineteenth-century England or late eighteenth-century France and Germany, or twentieth-century America (p. 381–83). The supposed precedence of historical to critical jurisprudence (p. 383) cannot really be established for most known systems. No Cujas preceded or even accompanied Justinian's codification; Maine's work followed rather than preceded codification; only in Germany and in the United States could the supposed order be supported. The suggestion on p. 386 that Cujas and Alciate are to be deemed to be the historical side of the jurisprudence of the French period of codification is itself worthy of the stage of

For all of these reasons, therefore, no objection to the Analytical-Sociological-Theory of Justice division of jurisprudence based upon the cycle theory can stand. If then, in our age at least, these three approaches are concurrently important, the fact that each sets its own problems and purposes, and has its own points of view,[131] are reasons for giving the student a baptismal induction to all, rather than a bath of oblivion in one. And apprehension which might be felt for the complicated approach of Hohfeld's six divisions, and Wigmore's ten divisions, seem to have little application to the simple threefold division proposed by the present writer.

VI. Conclusion

This paper has been penned in constant fear of the Scylla of the naïve and the Charybdis of the esoteric. At times it seems to be offering an over-simple answer where greater minds have offered only a complex and qualified answer. At others it seems to be offering disputations about labels as a contribution to one of the most serious problems of legal education.

This problem, moreover, touches far more than the interests of the legal profession. The lag between undergraduate teaching and learned writing in jurisprudence has already been mentioned. It is grave enough in itself. But its full gravity can only be measured when the lag between such teaching and the proper demands of twentieth-century society upon the young lawyer and future judge is also measured. In an age of rapidly extending social control through law, we are still teaching, for the most part, a jurisprudence which fitted the needs of a *laissez-faire* society. In an age when bitter disagreement concerning human purposes and concerning the nature of society, permeates the whole field of law, we are

word-study and fictions, and seems, in any case, inconsistent with the interpretation of Cujas given on p. 392. Again it is most difficult to understand how the learned writer, in associating the philosophical schools with *commentation*, can make Kant, Trendelenburg, Duguit, Kohler, and the rest contemporaneous with the pre-legislative state. Insofar as he does not overlook such writers, Professor Isaacs would no doubt place them under the constructive jurisprudence of the Legislative Stage. But is there any such vital difference between the direction of inquiry (as distinct from the views taken) by such writers and those of Grotius or Pufendorf? With respect, the discrimination suggested seems based on circuitous reasoning. The association of Analytical Jurisprudence with the Stage of *Commentation* is in itself not objectionable, but can it really be said, as Professor Isaacs seems to say, that it is not at least as closely associated with the Stage of Legislation and Codification? If it be arguable, as the author thinks it is (p. 398), that Austin's work was not of the legislative period, it is equally so that he is not of the period of *Commentation*. The author is willing to explain Bentham as "the jurist of the legislative period which ensues after his death" (p. 382). Why should not Austin have a similar indulgence? The continuous relation he suggests between Austin and Blackstone back to Hale seems fanciful: it no more indicates a common method than Stammler's use of the *Burgerliche-Gesetzbuch*. On the other hand, who can deny that the rise of Analytical Jurisprudence in Germany coincided in the nineteenth century with the rise of legislation and codification? Or that that of the continent generally coincided with a period of codification and written constitution making? Again, what better example is there of the *Comparative-Censorial* method than the body of the *ius gentium* created by the Roman *praetor*? Yet our author places this kind of activity in the period of *Glossation* (or word-study) when in actual fact its work was done during the period of *Commentation* (or principle-study); when indeed "the period of the *ius gentium*" is a synonym for the period of devotion to principles rather than words, the spirit rather than the letter, the intention rather than the formula.

[131] Isaacs, *op. cit.* 375.

still teaching a jurisprudence based on an assumed general agreement or at least indifference in these matters. In an age when man is constrained to bring disciplined thought to bear upon the control of himself individually and in the mass, we are still, for the most part, indulging the assumption that the really significant question about the law is whether it can be viewed as a logically self-contained system. In an age, unrivalled for fluidity and rapid change even in basic legal conceptions, we are still teaching jurisprudence as if the law were static, capable of being dismantled and restored at leisure. Or if we profess the purer analytical science, we are seeking those logical varieties, which must necessarily, insofar as they claim absolute validity, be removed *toto caelo* from the urgencies of the age in which we live.[132]

This stress between what society demands and what legal education has up to now offered, must be reduced. Nor mere manipulation of labels will remove it. What is called for is such a marshalling of the materials of jurisprudence as will make the results of scholarship available to students, in a form which has meaning for the world about them.[133] In adopting the Analytical-Sociological-Theory of Justice division the writer has attempted no more than a design towards this end.

[132] For the penetrating suggestion that some of the impetus behind modern concentration upon analytical jurisprudence arises from the wish to escape from these urgencies (see Pound, *Fifty Years of Jurisprudence*, *loc. cit.*, *supra*, p. 107, at 28).

[133] Hohfeld made his plea to American Universities on similar grounds and with a clear programme as long ago as 1914 ("A Vital School of Jurisprudence and Law," in *Fundamental Legal Conceptions*, 1923, 332, esp. 332–338, 365). The passage of time has only increased the urgency of his plea; and perhaps simplified and clarified the programme.

JULIUS STONE.

THE ILLEGALITY OF A TRADE UNION

THE development of the relationship between trade unionism and English law is an intricate process, the complications of which are not always sufficiently understood. The two forces went through alternative stages of attraction and repulsion which it would be a fascinating task to describe. The present paper has no such ambitious purpose. Its sole object is the analysis of one particular phase of the legal history of trade unionism. It tells a story which belongs to the past, but which has left its mark on the present law, and the excuse for recounting the struggles of a past generation is that they throw a light not only upon the law of restraint of trade, but on certain aspects of the judicial process and of the principle of precedent.

Towards the end of the 1860's the legal status of the trade unions had become intolerable. The "revolutionary" trade unionism of the Owenite "Grand National Consolidated Trades Union" had passed away long ago, and the "New Model" of well organised and centralised craft unions with an elaborate system of benefits and a cautious strike policy had carried the day. But the law had failed to adapt itself to the changes which had taken place in the trade union world. True, the trade unions had ceased to be criminal conspiracies. Since the legislation of 1824[1] and 1825[2] the attitude of the law towards trade unionism had passed from the stage of

[1] 5 Geo. 4 Ch. 95.
[2] 6 Geo. 4 Ch. 195.

suppression to that of abstention. But that abstention was complete. The agreements between the members and those between the union and its officers were illegal on the ground that they were in restraint of trade. The Courts refused to give any protection to the considerable funds which the unions had accumulated, and a fraudulent secretary or trustee of a union who embezzled the society's funds went scot free.[3]

This was the situation which led to the Report of the Royal Commission on Trade Unions of 1869[4] and to the passing of the Trade Union Act, 1871.[5] It was one of the very few occasions on which the British trade unions demanded the positive intervention of the law in their own affairs. In this country trade union legislation, which owed its origin to the influence of the unions themselves, was usually of a negative character—it removed some rule of the common law which the unions considered to be as unjust or injurious. This is what happened in 1875,[6] in 1906,[7] and in 1913.[8] But the Act of 1871 was intended as a positive step towards the *rapprochement* between the organisations and the Courts.

Yet, if the Courts were reluctant to recognise the legal existence of the unions, the unions were even more hesitant to take their affairs into the Courts. They did not ask for the legal enforcement of their "recognition" as organs of collective bargaining by the employers, nor did they crave for the interference of the law in their domestic affairs. On the contrary, they insisted that the "agreements" between themselves and their members should remain what they had always been: informal understandings, binding in honour only, and fortified only by those social sanctions which the unions had good reason to regard as safeguards stronger than any assistance that the Courts would be able to give them.[9] All they intended to obtain and all that Parliament meant them to obtain was the assistance of the Courts against defaulting officers and trustees and the protection of their funds.[10]

It is against this general historical background that one should read the famous third and fourth sections of the Act of 1871.

By Section 3 "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

Section 4, however, provides that "nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of" five enumerated types of agreement, all of which—with the probable exception of No. 4 ("any agreement made between one trade union and another")—refer to the domestic affairs of the unions. The more important of these domestic "contracts" are—

1. Agreements between members as such, concerning the conditions

[3] *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153; *Farrer* v. *Close* (1869), L.R. 4 Q.B. 602.

[4] Eleventh and Final Report of the Royal Commissioners Appointed to Inquire into the Organisation and Rules of Trade Unions and other Associations, 1869, Cd. 4123. For the history of the Royal Commission, see Webb, *History of Trade Unionism*, chap. V, especially p. 264, *sq.*

[5] 34 and 35 Vict. Ch. 31.

[6] Conspiracy and Protection of Property Act, 1875, 38/39 Vict. Ch. 86.

[7] Trades Disputes Act, 1906, 6 Edw. 7 Ch. 47.

[8] Trade Union Act, 1913, 2 and 3 Geo. 5 Ch. 30.

[9] Minority Report, p. lix, which formed the basis of the Government Bill.

[10] See the speech with which the Home Secretary, Bruce, introduced the Bill in the House of Commons, *Hansard* CCIV, 266. Similarly Lord Morley in the House of Lords, *Hansard*, CCV, 1918.

on which any members shall or shall not sell their goods, transact business, employ, or be employed, e.g. agreements not to work beyond certain maximum hours or for less than certain minimum wages. (No. 1.)

2. Agreements for the payment by any person of any subscription or penalty to a trade union, e.g. the member's own subscription to his union (No. 2).

3. Agreements for the application of the union funds to provide benefits to members (No. 3a).

In order to appreciate the significance of Section 4 and the way it was interpreted by the Courts, one must fully realise the somewhat paradoxical situation of a trade union sued by one of its members, say, for the payment of benefits or for an injunction to prevent his expulsion or to restore his membership rights. The member will rely on Section 3, the union will plead Section 4. As against this the member may point to the limited scope of that Section. "Nothing *in this Act,*" he will say, "is to make our agreement directly enforceable. But I say that the Act is not required to produce this effect. If you, the union, were illegal at common law, if you owed your legality solely to Section 3, then indeed you might rely on Section 4. But I say that you are legal at common law, therefore I could have sued you even if the Act had never been passed. It is not the Act, it is the common law which makes you legal and gives contractually binding force to our agreement." And then the union will try to establish its own common law illegality. Thus, the common law illegality of the trade unions which had been a means of their suppression, and later an obstacle placed in the way of the protection of their funds, became, after 1871, a weapon in their own armoury.

It is the attitude of the Courts towards this situation which is described in the present paper.

Whatever be the scope of Section 4 of the Trade Union Act, 1871, it is clear that it does not deprive of its direct enforceability any agreement which is contractually binding at common law. All that the Section does is to withhold certain types of relief[10a] in the case of contracts which owe their legality entirely to the Act itself, i.e. to contracts which, at common law, would have been void for being in restraint of trade.

Nothing would have been more surprising to the learned lawyers who wrote the Reports of the Royal Commission of 1869 than to be told that there could be any domestic union agreements, etc., which a court of law would not have to consider as contracts in restraint of trade at common law. It is probably a safe assumption that not only the Chairman, Sir William Erle, but also the representative of the unions and author of the Minority Report, Mr. Frederic Harrison, were firmly convinced that any one of these agreements was *ipso facto* a restraint, and, indeed, the original definition of a trade union in Section 23 of the Act made such a conclusion practically inevitable.

The forty years which followed the passing of the Act saw a development of this branch of the law, and of the interpretation of the Act, which led to a situation vastly different from that prevailing in 1871. The definition of a trade union was decisively altered by Section 16 of the Trade Union (Amendment) Act, 1876,[11] so as to include combinations

[10a] The term "directly enforceable" has been the subject of much litigation. On the whole, its interpretation has tended to become more and more restrictive. This is another manifestation of the "controlling" tendency discussed in the text.

[11] 39/40 Vict. Ch. 22.

which would not have been unlawful at common law by reason of one or some of their purposes being in restraint of trade. Whatever may have been the object of this amendment—and it is possible that it was chiefly intended to affect trade associations and similar bodies[12]—it opened the way towards a separation between the two questions: "What is a trade union?" and "Is a trade union unlawful for being in restraint of trade?"[13] While, before 1876, the law implicitly assumed that there could be no such thing as a trade union unaffected by the law of restraint of trade,[14] the amendment of that year has made it possible to distinguish those societies which are so affected and those which are not. Between the end of the '80's and the outbreak of the First World War, the Courts showed themselves inclined to apply this distinction to internal trade union affairs. Ever since the decision of the Court of Appeal in *Swaine* v. *Wilson*,[15] the Courts have refused to apply Section 4 to the internal disputes between trade unions and their members when they were satisfied that the association concerned, although a trade union, was not in restraint of trade.

This change might be ascribed to a gradual transformation in the attitude of the Courts towards the phenomena of social and economic life. The tendency towards a restricted application of Section 4 is unmistakable. No doubt, judges must always have looked with disfavour upon a situation in which the union could escape its liability towards its members by seeking shelter behind its own common law illegality. But the generation of lawyers whose political philosophy had informed decisions like *Hilton* v. *Eckersley*[16] and *Hornby* v. *Close* (*supra*), and the Majority Report of 1869 were quite prepared to accept this infringement of the sanctity of contract. In doing so economic individualism paid the price for the outlawry of associations and agreements of which the mid-Victorian middle classes so emphatically disapproved. After 1870 trade unionism—at least among the skilled workers—began to become "respectable."[17] The judicial

[12] Slesser and Baker, *Trade Union Law*, pp. 132–133.

[13] For a very clear analysis of the effect of the changed definition, see the judgment of Channell, J., in *Gozney* v. *Bristol, etc., Society*, [1909] 1 K.B. 901, at pp. 905–906.

[14] The further amendment of the definition of a Trade Union by Sections 1 and 2 of the Trade Union Act, 1913, had nothing to do with our subject. It merely concerns the question: "What is a trade union?" but not the question: "Is a trade union in restraint of trade?" See *Miller* v. *A.E.U.*, [1938] Ch. 669.

[15] [1889] 24 Q.B.D. 252.

[16] [1855] 6 E and B 47.

[17] It is not inappropriate to refer to a possibly parallel development among economists. See, e.g. the most illuminating passage in Jevons', *The State in Relation to Labour*, 1887, pp. 126–127, where he discusses the "principle of degeneration of associations" as applied to trade unions. "The existing great trade societies only need to be let alone and they will probably degenerate from their original trade purposes. But inasmuch as those trade purposes were against the public good, the process of degeneration will probably bring them more nearly into consonance with public interests. What were, under the Combination Laws, mere midnight conspiracies, are developing, and will develop, into widespread philanthropic bodies, headed by members of Parliament, meeting in large halls before a table full of reporters, gradually giving up their mistaken and selfish ideas. No one could have read the proceedings of the recent Trades Union Congress in London without feeling that recent wise legislation was bearing good fruit. Instead of machine breakers and midnight conspirators, the working men met as the members of a parliament to discuss the means and ends of legislation with dignity and propriety at least equal to that recently exhibited at St. Stephen's. No longer entirely devoted to the pet fallacies and interests of their order, their deliberations touch many of the most important social questions of the day. The more extensive the federations of trades which thus meet in peaceful

approach towards trade unions began to change. Step by step it moved from the spirit of "abstention" to that of "control." As the public policy which condemned the agreements mentioned in Section 4 lost its root in the economic philosophy governing public opinion and became a matter of legal tradition rather than of living political conviction, it was less and less apparent why the law should maintain that aloofness towards trade unionism which had been born out of the almost unconcealed hostility of lawyers like Baron Alderson and Chief Justice Erle. Cases like *Swaine* v. *Wilson*, above, and *Gozney* v. *Bristol Trade and Provident Society*[18] are minor stages on the long road which led from the unwillingness to recognise the legal existence of trade unionism to the desire to submit it to the regulation of the law, from *Hilton* v. *Eckersley*, above, to the first *Osborne* case.[19] It may only be a coincidence that, in the particular field of the law of restraint of trade, this new tendency begins to manifest itself in the same year, 1889, which saw the Dockers' Strike and the rise of the New Unionism.

The three decisions in which the Court of Appeal[20] upheld the common law legality of a trade union were rendered during those three decades preceding the First World War, which mark the final stages of the development towards complete trade union recognition in Britain.

Broadly speaking, three criteria of legality can be found in these decisions; (*a*) the "severability" of "benefit" and "trade" objects, (*b*) the differentiation between the mere financial assistance of strikers and the active conduct of a strike, (*c*) the distinction between the mere "sanctioning" and the "ordering" of a labour stoppage. It should be mentioned at the outset that in the first two of these cases the unions concerned showed certain highly anomalous features, while in the third —the only case in which one of the important British trade unions was declared to be legal at common law—there were special reasons why the *favor iudicis* should have come down heavily on the side which asserted the "legality" of the union.

(*a*) If one looks at the type of union from which the stigma of "restraint of trade" was first removed by the Court of Appeal, one can discover how vital a part was played by the semi-mythical dichotomy of trade union purposes and how this was able to serve as a kind of escape door which permitted the Courts to enforce the mutual liabilities between unions and their members. That the "benefit" or "friendly society" objects of a union can be "severed" from its "trade" objects, is a belief which impressed itself early upon the judicial mind. Lawyers did not take cognisance of the inseparable connection between the "method of mutual insurance" and the "method of collective bargaining," so clearly demonstrated by Mr. and Mrs. Webb,[21] just as, at a later stage of the development, they erected, in the *Osborne* decision, an artificial barrier between the

conference, the more wide and generous must of necessity become their views. Enjoying all the rights and performing all the duties of the English citizen, the trades unionist will before long cease his exclusive strife against his true ally, the wealthy employer. It is impossible not to accept the general views of Mr. Henry Crompton, that as working men gradually acquire their full rights, their leaders will turn to the noble task of impressing upon them the duties of citizenship."

[18] [1909] K.B. 901.

[19] [1910] A.C. 87.

[20] *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; *Gozney* v. *Bristol, etc., Society*, [1909] 1 K.B. 901; *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540.

[21] *Industrial Democracy*, especially Part II, Chap. I.

"method of collective bargaining" and that of "legal enactment." Thus we find that, in *Swaine* v. *Wilson*, it was a comparatively small local union of very highly skilled operatives, the "Bradford Power-loom Overlookers' Friendly Society," of which it was held that its benefit purposes were the "real objects" of the society. "Restrictive" rules, which clearly tended to prevent competition between members and exclude outsiders in the labour market, were said to have been made "bona fide for the purpose of protecting the funds from claims which will be made if one member in work seeks to displace another who is himself in work," and "of enabling members out of work to obtain work and relieve the funds."[22] The control of the market was thus made to appear as subservient to the preservation of the union funds, while any historical analysis of British trade unionism in the 19th century would seem to yield the result that the method of insurance served, amongst others, the ultimate object of helping to control the market. Be that as it may, the Court succeeded in overcoming what Lord Esher, M.R., described as the union's "mean" attempt to frustrate the claim of a member for £50 disablement benefit. It was a "hard case" —the plaintiff had been struck by blindness arising from his employment— and the Court was very favourably disposed towards his claim.[23]

Twenty years later the Court of Appeal came to a similar conclusion when the "Bristol, West of England, and South Wales Operatives' Trade and Benefit Society," a registered trade union, was sued by one of its members for a declaration to the effect that he had not broken the rules and for the payment of 2s. 6d., deducted from his sick pay as a fine for a breach of the rules. In this case, *Gozney* v. *Bristol, etc., Trade and Provident Society*,[24] the anxiety of the Court to emphasize the "benefit" purposes at the expense of the "trade purposes" was even more apparent. This union, however, not only kept a separate "trade fund," but offered dispute pay, travelling relief, and certain kinds of legal assistance only to those members who made a special contribution to that fund, while the others had to be content with friendly benefits, such as sick pay, superannuation, etc. Its rules did not, therefore, show that "blending" or "massing" of funds for all purposes which Lord Macnaghten,[25] Lord Shaw of Dunfermline,[26] Lord Robson,[27] and Vaughan Williams, L.J.[27a] considered as one of the most decisive symptoms of common law illegality.

This "severability" test has lost most of its practical significance since the decision of the House of Lords in *Russell* v. *Amalgamated Society of Carpenters, etc.*, above.

(*b*) A far more important feature of *Gozney's* case is the differentiation between various types of strike activities and the classification of financial strike assistance, granted by the union to its members, as a harmless "benefit" object. This distinction between the payment of strike money —which is a "legal" object—and the "conduct" of a strike —which is a restraint of trade—has an interesting history. It throws some light on the attitude of the Courts towards trade unionism since the mid-Victorian period, and also, perhaps, on the peculiar characteristics of judge-made law.

[22] *Per* Lindley, L.J., at p. 261.
[23] At p. 256.
[24] [1909] 1 K.B. 901.
[25] *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421, at p. 430.
[26] *Ibid.*, at p. 436.
[27] *Ibid.*, at p. 442.
[27a] *Russell's* case, [1910] 1 K.B. 506, at p. 518.

That the distinction is a purely "legal" point, devoid of social relevance, is a fact too obvious to be further elaborated. But that it was able to find favour in the eyes of some of the most eminent judges of the Edwardian period requires explanation. It should be remembered that, in 1867, the United Society of Boilermakers and Iron Shipbuilders was held to be an illegal society, expressly on the ground that its rules authorised the grant of strike pay,[28] and that this view was upheld two years later in the case of the Amalgamated Society of Carpenters.[29] This latter Society was the prototype of that "New Model" of craft union[30] which impressed its stamp on trade union policy between 1850 and 1890. Its rules were illegal, not only on the ground "that they authorised the payment of allowances to potential strike-breakers so as to keep them away from the scene of combat, but also because they permitted one branch to pay support money to another involved in a dispute."[31] To the judges whose views prevailed in these cases it was still axiomatic that there was no relevant difference between the financial support and the active direction of a strike.

The decisive impulse which gave a new turn to the development came from an event in the social and political sphere outside the Courts. This event was the publication in 1869—between the dates of *Hornby* v. *Close* and of *Farrer* v. *Close*—of the Report of the Royal Commission on Trade Unions which exonerated the trade unions of most of the grave accusations that had been levelled against them. This Report—it must have come as a mild surprise to many lawyers—inspired[32] the dissenting judgments of Hannen, J., and Hayes, J., who were anxious to enable a union to prosecute a secretary who had misappropriated part of the union's funds, and thus to do by judicial legislation what was ultimately left to be done by Parliament in 1871. Hannen, J., inferred from Sir W. Erle's Memorandum on Trade Unionism which formed part of the Majority Report that what impressed upon any given body of trade union rules the hallmark of restraint of trade was the attempt to impose upon the individual an *obligation not to work*. This "benevolent" dissenting judgment—in some ways a landmark in the legal history of trade unionism—was the thin edge of the wedge which first introduced the distinction between rules authorising members to draw strike pay or branches to pay allowances to potential strike-breakers, and rules and practices of a union "tending to impose an obligation or coercion on its members."[33]

[28] *Hornby* v. *Close* (1867) L.R. 2 Q.B. 153, *per* Cockburn, C.J., and Blackburn, J.

[29] *Farrer* v. *Close* (1869), L.R. 4 Q.B. 602, Cockburn, C.J., and Mellor, J.

[30] Webb, Hist., 231.

[31] The rules are printed in full in Davis, *Law and Practice of Friendly Societies and Trade Unions*, 1876, Appendix, pp. 263–320.

[32] It also seems to have influenced Cockburn, C.J., whose attitude towards trade unionism in *Farrer* v. *Close* is less unfriendly than in *Hornby* v. *Close*. He even quotes and recommends the then recent treatise on trade unionism by the Comte de Paris.

[33] Pp. 612–13. The crucial sentence in Erle's Memorandum was that the criterion of illegality was said to consist in "any mutual obligation binding each other not to work." Hannen, J.'s judgment, together with the much later judgment of Fletcher Moulton, L.J., in *Gozney's* case, [1909] 1 K.B., at pp. 922–23, is among the leading authorities for the general proposition that collective strike action is not *per se* an illegal act, but that the legality or illegality of a strike depends on its objects and the means employed. Even measures tending "to support and maintain the strike for a longer time, and so to increase the chance of the men obtaining the object of the strike" are not *per se* illegal. The concluding passage (p. 615) shows the influence of the Minority Report: "This,"

To-day the views expressed in the dissenting judgments in *Farrer* v. *Close* "though they did not prevail, may be taken to represent the present law."[34] But forty years elapsed after the decision in *Farrer* v. *Close* until the differentiation between the commencement and conduct of a strike and its financial support was rediscovered and used for the interpretation of the 1871 Act so as to submit the domestic affairs of the unions to the control of the Courts. Though opportunities were not lacking for the application of the criterion, it remained in abeyance. There is no hint that the union's attitude to strikes might be the crucial test of illegality in cases such as *Rigby* v. *Connol*,[35] the decision in which, in 1880, Section 4 came up for the first time for judicial construction in England,[36] or in *Old* v. *Robson*,[37] the case in which the Queen's Bench Division in 1890 followed *Farrer* v. *Close* and declared the rules of the Amalgamated Society of Carpenters and Joiners to be illegal at common law. It was not until 1909,[38] that, in *Gozney's* case, the thread was taken up where Hannen, J., had left it in 1869. The defendant society showed certain highly unusual characteristics. It was established on a purely local basis and accepted for membership workmen without any reference to their trade. Nor does it (the prevention of strike breaking) "it is alleged, is in restraint of trade: that is, it disturbs the course and postpones the effect of competition amongst the men which, if left to itself, might sooner compel them to return to work, and this, it is contended, is contrary to public policy. I think that our judgment ought not to be based on this line of argument. By the expression that a thing is contrary to 'public policy' I understand that it meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interest of employers, because they may be thereby forced to yield, at their own expense, a larger share of their profit or advantage to the employed; but I have no means of judicially determining that this is contrary to the interests of the whole community; and I think that in deciding that it is, and, therefore, that any act done in its furtherance is illegal, we should be basing our judgment, *not on recognising legal principles, but on the opinion of one of the contending schools of political economists.*"

[34] Halsbury, *Law of England*, Hailsham Edition, Vol. 32, p. 462, note (r). This note contains a full conspectus of the decisions affecting the common law legality of strikes.

[35] (1880), 14 Ch.D. 482. Jessel, M.R., who, when in the House of Commons, had taken a prominent part in the debates about Section 4, had no hesitation in applying the section to the Journeymen Hatters' Fair Trade Union of Great Britain and Ireland, on the ground that the rules of that ancient craft union embodied "trade purposes," e.g. "to regulate the carrying on of the trade," the limitation of the number of apprentices and employees, and—in effect—the "closed shop."

[36] Similarly, even before *Rigby* v. *Connol*, the Court of Session, 1st Division: *Shanks* v. *United Operative Masons' Society of Scotland* (1874), 1 R. 823; 2nd Division: *McKernan* v. *Same, ibid.* 453, see especially *per* Lord Monckrieff at p. 458.

[37] (1890), 64 L.T. 282. *Swaine* v. *Wilson* above, which had been decided by the Court of Appeal in 1889, was not mentioned when *Old* v. *Robson* came before the Queen's Bench Division in 1890, and Kennedy, J., doubted the correctness of the decision on this ground in *Burke* v. *Amalgamated Society of Dyers*, [1906] 2 K.B. 583, at p. 590. In *Sayer* v. *Amalgamated Society of Carpenters and Joiners* (1902), 19 T.L.R. 122, *Swaine* v. *Wilson* was quoted, together with *Old* v. *Robson* and *Hamba* v. *Close*, but Bruce, J., held himself bound by *Old* v. *Robson* and distinguished *Swaine* v. *Wilson*. The report is incomplete. Finally, the question was set at rest when, in *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421, the House of Lords came to the same conclusion as *Old* v. *Robson*.

[38] In *Gozney* v. *Bristol, West of England and South Wales Operatives' Trade and Benevolent Society*, [1909] 1 K.B. 901. The "Bradford Power-Loom Overlookers' Friendly Society," the rules of which were examined by the Court of Appeal in 1889 in *Swaine* v. *Wilson* above, had no provision for strikes, so that the Court had no opportunity of pronouncing upon the problem under discussion

seem to have engaged upon collective bargaining or labour disputes at all.[39] It was, nevertheless, a "border-line case,"[40] because the rules promised six weeks' strike pay to members fighting for certain approved objects, and a continuation of the strike pay beyond this period within the discretion of the executive. In the Divisional Court Channell, J., regarded this discretion vested in the union officials as the element which fettered the members' freedom of action and gave the society the imprint of common law illegality,[41] but he emphasized that the financial support of strikers had to be distinguished from the "procuring" of a stoppage, and on this principle the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton, Buckley, L.JJ.) agreed with him,[42] though they reversed the decision on the facts. They classified the payment of strike money as "a mutual insurance . . . against . . . loss of wages by . . . reason of voluntary abstention from work,"[43] and Fletcher Moulton, L.J., [44] emphatically denounced as "a tremendous conclusion to be based on . . . slight premises" the view that a union was facilitating strikes when paying strike benefits. All it did was to keep the strikers out of starvation, and this type of mutual insurance was not expressive of the vice of trade interference, but of the virtue of thrift. That "restraint of trade" and the fight against starvation were not opposites, but inseparably intertwined in the fabric of trade unionism, was not taken into account by the learned Lord Justice. His judgment illustrates the breakdown of legal distinctions in the face of social realities. It shows the gulf which separates the world of law from that of social relations.[45]

(*c*) An even more artificial distinction between various types of strike activities was used as a criterion of "legality" when, two years after the *Gozney* case, the Court of Appeal decided that the Amalgamated Society of Railway Servants was a union not in restraint of trade.[46] The rules of

[39] This is apparently the correct interpretation of the enigmatic rule that no officer or member "shall be authorised or permitted to take any active interest in, or aid in any way, or otherwise assist any trade union movement except in his private capacity." Buckley, L.J., at p. 926, regarded this rule as a matter of "first class importance," and his decision that the union was not in restraint of trade was largely based upon it.

[40] See *per* Channell, J., at p. 910.

[41] At p. 910.

[42] See, e.g. *per* Buckley, L.J., at p. 925.

[43] *Per* Cozens-Hardy, M.R., at p. 915.

[44] At p. 921. Similarly Vaughan Williams, L.J., in *Russel* v. *Amalgamated Society of Carpenters*, [1910] 1 K.B. 506, at p. 519.

[45] Nevertheless, the judgment of Fletcher Moulton, L.J., remains, to this day, one of the most important and enlightened contributions to English trade union law. On the basis of a comprehensive conspectus of the attitude of English law towards strikes throughout the centuries, it rejects the proposition "that strikes are *per se* illegal or unlawful by the law of England," and arrives at the bold conclusion that even the facilitating of strikes is not—or at least not necessarily—an illegal object (p. 923). It is obvious that this carries the line of argument much further than the differentiation between strike pay and "initiation of a strike." It means that probably only in comparatively few cases could a trade union be said to be in "restraint of trade," unless, indeed, the willingness to "fetter the freedom" of its members was expressly written into its rules. This passage in the judgment of Fletcher Moulton, L.J., which bases the common law legality of the union on the legality of strike action as such rather than upon that of a particular type of union activity in relation to labour stoppages, does not seem to have had much influence upon the subsequent development.

[46] *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, the "Second Osborne Case." The composition of the Court was the same as in *Gozney's* case: Cozens-Hardy, M.R., Fletcher Moulton, and Buckley, L.J.

this trade union must be seen against the background of the acute struggle for recognition which was fought out between organised labour and the British railway companies during the two decades preceding the First World War at a time when collective bargaining had long been an established institution in many other industries.[47] The Annual Meeting of the Society was empowered "to inaugurate any movement or decree any proceedings in the interest of the society or its members."[48] The Executive Committee was authorised "to sanction trade movements of members" for a number of purposes connected with wages, hours, conditions of employment.[49] This authority, however, was hedged in by a number of restrictive provisions.[50] Thus, no strike was to be "sanctioned," unless and until all attempts to settle the dispute by negotiation, and, in the second place, by arbitration, had been exhausted. More important, organised union action was made dependent upon the willingness of two-thirds of the men to sign the notice papers issued by the executive committee. Once, however, the notices had been handed to the employers and work had been withdrawn, it was to be "the paramount duty of the executive committee to use every lawful means to assist the men in their struggle." The struggle was to be "directed by the general secretary." In short: The union, while determined to keep the peace as long as possible, was nevertheless prepared to fight. The legal criterion used in the *Gozney* case would have led to the result that the union was in restraint of trade, for the Amalgamated Society went far beyond the mere "assistance" of the individual strikers. The distinction made in the *Second Osborne* case, however, was that between rules authorising the *sanctioning* of a strike and provisions enabling the executive to *order* a strike. In the judgment of the Master of the Rolls emphasis is laid on the two-third majority vote which appears as a "voluntary act" without a "taint of illegality." The fact that the executive had to take the initiative in issuing the notice papers and that the general secretary was expressly instructed to "direct" the struggle, weighed little in comparison with the absence of express clauses hindering a striker from resuming work or putting pressure on the minority.[51] The obligation to cease work becomes the exclusive criterion of illegality—the mere desire to regulate the conditions of the labour market and to bring pressure to bear upon the employer seem to become irrelevant. The ground is shifted from the general nature of the society's activities to a minute examination of the degree to which the union attempts to control the action of its own members.

This case is the high-water mark of the judicial tendency to control the internal management of trade union affairs by saving its "legality" at

[47] Webb, *History*, pp. 522–54. The Amalgamated Society of Railway Servants was established in 1871, and merged in the National Union of Railwaymen in 1913.

[48] Rule 2.

[49] Rule 13, Section III (1).

[50] *Ibid.*, 2.

[51] P. 540. "I can find nothing to hinder a man who has handed in his notice from resuming work. *He will . . . cease to be entitled to strike pay, but that is all.*" Fletcher Moulton, L.J., at p. 564, was "struck by the absence of all the familiar provisions relating to strikes and the power of the society to direct whether men shall or shall not work under particular circumstances. . . ." Buckley, L.J., whose remarks on this point are *obiter dicta* (see p. 572) also considered the question whether a member was "bound to strike" and persevere in the strike as the exclusive test of restraint of trade (p. 571). The shadow of Sir William Erle's Memorandum of 1869, if one may say so, obscures the realities of the situation.

common law. The Amalgamated Society of Railway Servants did not show any of the anomalous features which characterised the union whose rules were before the Court in *Gozney's* case. If, nevertheless, it was declared to be "legal," the heavily laden atmosphere in which the case was decided may partly account for its surprising result. In the previous year, the plaintiff had won his—famous or notorious—dispute with the defendant society[52] about the political activities of trade unions. This second case arose from his expulsion from the union on the ground that, by bringing the first action, he had been "guilty of attempting to injure the society." That his action for the rescission of his expulsion and for his restoration to membership[53] was not unfavourably looked upon by the Court, may—without presumptuousness—be surmised. The desire to protect him against an expulsion which must have been singularly obnoxious to the judges may or may not have subconsciously stimulated their attempts to find positive criteria of "legality."

The three cases discussed in the previous pages are interesting symptoms of the change in the judicial approach towards trade unionism between the third quarter of the 19th century and the first quarter of the 20th. They vividly demonstrate how the Courts—previously determined to place *hors de la loi* the unions and their agreements—began to show themselves anxious to establish the closest possible contact between the unions and the law. More than that, they show a phase of the legal history of trade unionism during which the transformation of the law of restraint of trade inaugurated by the *Nordenfeldt* case[54] temporarily affected the legal status of the unions. It is true that the *Nordenfeldt* case was concerned with the criteria of reasonableness applied to an existing restraint, while the cases under discussion refer to the more fundamental problem whether there is any restraint at all. Yet the principles governing the burden of proof show an unmistakable affinity of the two developments. Thus, while Sir W. Erle still thought that there was a presumption in favour of restraint of trade,[55] the *Second Osborne* case emphasises that the onus rests upon the party who denies the enforceability of an agreement governed by Section 4, i.e. who alleges its invalidity at common law.[56] The tendency to "sever" "harmless" trade union objects from purposes stigmatised as restraints points in the same direction,[57] and so does an occasional shifting of the field of inquiry from the objects and methods laid down in the rules to the actual conduct of the union and to its "aims."[58]

[52] [1910] A.C. 87.

[53] Brought in the form of an action for four declarations and an injunction.

[54] *Maxim Nordenfeldt Gun Co.* v. *Nordenfeldt*, [1894] A.C. 535.

[55] Memorandum, p. lxx.

[56] Cozens-Hardy, M.R., at p. 553. Fletcher Moulton, L.J., at p. 556. Lindley, L.J., in *Swaine* v. *Wilson*, at p. 259 and at p. 260. And see Halsbury, *Laws of England*, Hailsham Edition, Vol. 32, p. 466, note (o).

[57] Lord Esher, M.R., in *Swaine* v. *Wilson*, at p. 257. Note the differentiation between "fundamental objects" or "general objects" and others. Lindley, L.J., *ibid.*, 260. Fletcher Moulton, L.J., in *Gozney's* case, *supra*, at pp. 920–21, deprecated this theory of a "main object." The doctrine of "severance" of objects, for which see also Collins, M.R., in *Cullen* v. *Elwin*, [1904] 90 L.T. 840, at p. 842, seems to have been exploded by the decision of the House of Lords in *Russell's* case, [1912] A.C. 421. (See below.)

[58] Lord Esher, *ibid.*, 257–258. Lopes, L.J., at p. 263. Lindley, L.J., *ibid.*, 260, seems to regard it as a criterion whether the rules tend to excite or encourage "ill-treatment, violence, or crime," a view which seems to be rather at variance with the general principles of restraint of trade, and not quite up to date in its

It is nevertheless easy to overestimate the importance of these decisions. If the *Second Osborne* case had remained the last word, it would have frustrated the intention of the framers of the Act of 1871 to keep the Courts away from domestic union disputes. For, if the Amalgamated Society of Railway Servants was outside the law of restraint of trade and legal at common law, how many trade unions would continue to enjoy the immunity vouchsafed by Section 4?

Yet, the *Osborne* decision, though never expressly overruled, did not remain the last word. The decision of the House of Lords in *Russell v. Amalgamated Society of Carpenters and Joiners*[59] indicates in effect a return to the older doctrine.[59a] It remained true that, in the words of Lord Macnaghten,[60] "There have been many and probably there may still be some trade unions lawful in every point of view, and not depending for their legality or for their immunity[60a] on the Act of 1871." But the criteria of legality applied in the case, especially the emphasis laid by Lord Shaw[61] upon the conferment of trade privileges on members complying with the union rules as an element of illegality, the virtual abandonment of the severance of objects,[62] the express approval bestowed upon the pre-1871 doctrine of *Hilton* v. *Eckersley* and of *Hornby* v. *Close*,[63] mark an implied and, one might suspect, deliberate departure from the *Osborne* case. Although to this day the three "legality" cases continue to be precedents, it is a fact that, since *Russell's* case, little has been heard of attempts to establish the "common law legality" of a trade union, and the *Second Osborne* case is the last reported decision in which such a plea was upheld.

It is, therefore, probable, that to-day there are few, if any, trade unions whose rules and agreements owe their validity to the common law. This assumption is justified not only by the decision in *Russell's* case, but also by the fact that, obviously as a result of the three cases discussed above, some at least of the larger trade unions expressly declared themselves to be in restraint of trade. They have thus tried to clothe themselves in an unassailable armour keeping at arm's length any attempt to make their domestic arrangements "directly enforceable" in a Court of Law. Thus, Rule 2 of the Transport and General Workers' Union[64] mentions among other "objects" of the society, "the power, in addition to any other powers given them by law or by these rules, to impose such restraints upon the labour of its members, or generally to interfere, *whether such interference is in restraint of trade or not*, but so far only as may otherwise be lawful, with the trade or conduct of such industries, business, and occupations as may be deemed expedient." This power is given to the union in order to achieve certain objects which include[65] "to endeavour

general approach towards the phenomena of trade unionism. See already Cockburn, C.J., in *Farrer* v. *Close*, *supra*: "We are bound to look not only to the rules themselves, but also to the conduct and operations of the society." See Halsbury *loc. cit.*, p. 465, note (m). In *Russell's* case, [1910] 1 K.B., at pp. 522, 524, 525, Farwell, L.J., expressly dissented from this view.

[59] [1912] A.C. 421, affirming Court of Appeal; [1910] 1 K.B. 506.

[59a] See, particularly, *per* Farwell, L.J., [1910] 1 K.B., at pp. 522–23.

[60] At p. 429.

[60a] As used by Lord Macnaghten, the word "immunity" means "immunity from prosecution for conspiracy," not "immunity from civil action in domestic disputes."

[61] Pp. 434–35.

[62] Lord Shaw, at p. 437; Lord Robson, pp. 441–42.

[63] Lord Robson, pp. 439–40.

[64] Milne-Bailey, *Trade Union Documents*, p. 62, under No. 3.

[65] See Rule 2 (a) and (b), *ibid.*, p. 61.

by all means in their power to control the industries in which the members are engaged," and "the settling and negotiating of differences and disputes between the members of the Union and employers, and other Trade Unions and persons, by collective bargaining and agreement, *withdrawal of labour*, or otherwise." This would seem to place the "common law illegality" of the union beyond any reasonable doubt.

Similarly, the Amalgamated Engineering Union[66] has the power to "control the industry in the interests of the community," to withdraw labour, and to impose restraints upon its members, the clauses as to withdrawal of labour and restraint of trade being verbally identical with those of the Transport and General Workers' Union.

The rules of the A.E.U. were considered by Morton, J., in *Miller* v. *Amalgamated Engineering Union*[67] the most recent reported case to deal with this topic. Following *Russell's* case, the learned judge declared the A.E.U. to be an "illegal" society at common law. He referred particularly to a clause which made a member who has "taken work from any employer at any place where or when a trade dispute exists between such employer and the union or any branch thereof" liable to expulsion with forfeiture of benefits, and held that, in comparison with "the benefit objects," the "objects in restraint of trade" were "primary objects," and, moreover, that the forfeiture of benefits provided "a very strong connection or nexus between the two." Despite the existence of a separate "superannuation fund," a "severance" between the objects was impossible.

The tendency which found expression in *Swaine* v. *Wilson*, in *Gozney's* case, and in the *Second Osborne* case, has undoubtedly receded since the decision of the *House of Lords* in *Russell* v. *Amalgamated Society of Carpenters* and, perhaps, as a consequence of the modern practice adopted by the draftsmen of trade union rules. Yet, it still remains possible that, at any given moment, a domestic trade union agreement might be declared directly enforceable by a Court of Law if the Court was not satisfied that the union was in restraint of trade.

Nothing can be more obvious to the historian than the sequence of suppression, abstention, recognition, and attempted control in the attitude of the law towards the autonomous organisations of the working class. We can observe that sequence in all industrial countries. Abroad, in France, in Germany, in the United States, the transitions from one stage to another are more clearly marked than in this country. Legislative enactments are the milestones on the road which draw our attention to the end of one stretch of our journey and the beginning of a new one. In this country, where enacted law has been less important than elsewhere in the relationship between the State and the trade unions, the more indistinct and inarticulate fluctuations of judge-made law have sometimes performed a similar function. The dramatic struggles between the legislature and the Courts about the external activities of the trade unions are well known. The story of the judicial reaction to the legislation of 1825, the creation of the law of criminal conspiracy, and its termination by the Act of 1875 has often been told. It has been pointed out more than once how the tort of conspiracy arose as a judicial response to the challenge of the Act of 1875, and how the intervention of the legislator became again necessary in 1906 in order to do for the law of tort what the Act of 1875

[66] Rules of 1926, No. 2 (I), (III), (XIII), Milne-Bailey, *ibid.*, pp. 58–60.
[67] [1938] Ch. 669.

had done for the law of crime. Everybody knows the attempt made in 1910 to impose a measure of judicial control upon the activities of the unions, and the legislative event to which it led in 1913. That, at one time, this "controlling" policy was even extended to the domestic affairs of the unions, is not often emphasised. No intervention of Parliament was necessary to scotch this tendency, because the Courts themselves, in the *Russell* case, took the steps which were required to restore the situation. But the three decisions analysed above have never been overruled. One day they may be brought to light, and it will then be a question of judicial policy rather than of law whether their "controlling" tendency will find favour in the eyes of the Courts.

O. KAHN-FREUND.

PUNISHMENT AND MORAL RESPONSIBILITY

OUR national reluctance to discuss abstract principles did comparatively little harm when there was a certain instinctive unanimity about sound fundamentals; in such circumstances a healthy moral instinct yields better results than an inadequate abstract theory. The man who merely knows that chicken is wholesome, as Aristotle remarks, is more likely to restore you to health than the man who knows that light meat is easily digested but does not know what kinds of meat are light. At present, however, when instinctive unanimity has disappeared, it becomes imperative to reflect upon abstract principles if we are not to submit to the casual influence of gusts of emotion. You can muddle through only with the aid of sound instincts; without them you make the muddle but you do not get through.

At present, then, the moral philosopher cannot but be concerned with the growing lack of recognition of moral responsibility and with the effects of this neglect upon the conception of punishment. If moral responsibility is a fact, it is a very important fact for those to consider who deal with the making and administration of the laws. Hence a moralist may be permitted to bring the abstract principles which it is his function to discuss to the attention of those who are concerned with their concrete application.

The plain man, if asked how punishment is justified, would reply that it is deserved, that a guilty act demands punishment. In other words, the theory of punishment which is assumed prior to reflection is a retributive theory. Nevertheless it must be admitted that there are considerable difficulties to be overcome before the retributive view of punishment justifies itself to reflection. To inflict suffering on an offender seems merely to be adding the evil of suffering to the evil of the offence, unless there be some ground other than the offence itself to make this reasonable. That, as we all know, is why many people have given up trying to find the ethical basis of punishment in its reference to the wrong act which is past, and seek it instead in the future effects of reformation and deterrence. A purely reformative theory, seeming at first sight much kinder than the old retributive view, commends itself easily to a vague moral idealism, and is perhaps now the predominant opinion among those who are halfway between the spontaneous reaction of the plain man and the analytic reflection of the moral philosopher.

Yet it has been clearly pointed out by many writers that the motives of reformation and deterrence are not by themselves sufficient to explain and justify punishment. If to deter possible future evildoers be sufficient reason for the infliction of suffering, this end could often be equally well attained by penalising the innocent, as in the shooting of hostages, or at any rate by punishing an innocent man who is commonly thought to be guilty. The reason why these acts are unjust is obviously because their victims are innocent. It follows that we cannot explain punishment without a reference to the past wrong act, and, if we discover what this link is, we shall have done justice to the retributive factor.

Moreover, a past wrong act is not only a necessary condition of the just infliction of punishment, but the extent of past guilt limits the extent of the punishment which it is right to inflict. If the motive of deterrence were alone taken into account, we should have to punish most heavily those offences which there is considerable temptation to commit and which, as not carrying with them any great moral guilt, people commit fairly easily. Motoring offences provide a familiar example. Few types of offence do more harm at present, yet, since no great moral stigma attaches to them in the public mind, people think little of committing them. A scale of penalties which could be justified on a purely deterrent principle would be generally thought excessive. This is plainly because it would not correspond with the moral guilt involved. A change in the public conscience on the subject would be necessary before the penalties for such offences could be acceptably increased.

When people speak of reformation as the motive of punishment, they usually fail to make the important distinction between reformation procured *through* punishment and reformation procured *in association with* punishment. The latter is not part of the punishment at all; it is the conferment of a benefit, not the infliction of an evil. The ministrations of the prison chaplain, for example, are not, or at least ought not to seem to be, part of the punishment. Reformation procured in association with punishment, while it is an eminently worthy aim, leaves the punishment itself unexplained.

Reformation, however, is really procured through punishment, when the delinquent realises that he has deserved his punishment and ought to amend himself accordingly. This at once obliges us to ask how punishment is deserved. We are brought up once again before the retributive factor.

The vice of regarding punishment entirely from the points of view of reformation and deterrence lies precisely in forgetting that a just punishment is deserved. The punishment of men then ceases to be essentially different from the training of animals, and the way is open for the totalitarian state to undertake the forcible improvement of its citizens without regard to whether their conduct has made them morally liable to social coercion or not. But merit and demerit, reward and punishment, have a different significance as applied to men and as applied to animals. A dog may be called a good dog or a bad dog, but his goodness or badness can be finally explained in terms of heredity and environment. A man, however, is a person, and we instinctively recognise that he has a certain ultimate personal responsibility for at least some of his actions. Hence merit and demerit, reward and punishment, have an irreducible individual significance as applied to men. This is the dignity and the tragedy of the human person.

We cannot, therefore, omit the factor of retribution if we are to account

adequately for the punishment of human beings. Among modern ethical thinkers, Kant and Hegel, with their followers, deserve credit for having recognized this clearly, but the insufficiency of their explanations in detail has probably contributed to the neglect of the retributive factor. For Kant it is an evident moral principle requiring no justification outside itself that crime deserves punishment, and a punishment equivalent in kind to the evil done. But is the *lex talionis* thus evident? Although it has a certain plausibility in cases where crime and the customary punishment are similar, as in the requital of murder by capital punishment, it would seem that, if the principle were universal and necessary, we should demand that the mode of execution resemble the method of murder. It would seem to follow, too, that the proper punishment for a theft of five pounds is a fine of five pounds. Since these applications are very far from being evident, we can hardly erect the *lex talionis* into a first principle.

For Hegel the wrong act is a negation of right, and the negation has to be negated by the reaction of society in the punishment of the offender. The English Hegelians gave this formula considerable currency in this country. Bradley says that the criminal has become "the realization and the standing assertion of wrong," and "in denying that assertion, and annihilating, whether wholly or partially, that incarnation by fine, or imprisonment, or even by death, we annihilate the wrong and manifest the right."[1] Bosanquet, in the same way, says that "punishment is the 'negation' of a bad will by the reaction of the social will for good."[2]

This Hegelian theory is really excessively obscure. If you could bring the murdered person back to life by executing the murderer, you could truly be said to negate the evil act, and, if you can reform the criminal, you can truly be said to negate his evil will. But how the infliction of a punishment which neither reverses the evil act nor necessarily reforms the evil will can be said to negate the wrong done is surely beyond the comprehension of any literal-minded person. Such an assertion is the kind of thing which causes philosophy to be regarded as a species of poetry rather than of exact thinking.

If we look to the older tradition of mediaeval scholasticism for something more satisfactory, we are often disappointed. Scholastic writers too frequently content themselves with a vague statement, not unlike the view of Hegel, that, when a man has transgressed the order of justice, it is fitting that justice, or whoever embodies its claims and powers, should react to the disadvantage of the offender. This is a foundation for compensation, where compensation is possible, but compensation is not yet punishment. If I steal your watch and merely have to restore it, I am not thereby being punished. The law itself, in the distinction between civil and criminal proceedings, discriminates cases in which redress is sufficient from cases in which positive punishment is required.

Nevertheless a really adequate principle is to be found in St. Thomas Aquinas. This he expresses by saying that "natural equity seems to entail that a man should be deprived of the good against which he acts; for he thereby renders himself unworthy of it."[3] An unwary interpreter might be tempted to apply this in the sense that, if, for example, a man takes away the life of another, it is immediately evident that he should be deprived of his own life. But his life and the life of another are not in

[1] F. H. Bradley: *Ethical Studies*, 2nd ed., 1927, pp. 27–8.
[2] B. Bosanquet: *Some Suggestions in Ethics*, 2nd ed., 1919, p. 195.
[3] St. Thomas Aquinas: *Summa contra Gentiles*, lib. III, cap. 144.

fact the same good. The good against which the wrongdoer acts, and of which he is to be justly deprived, must be his own good. Hence the real force of the principle lies in the consideration that wrongdoing is the misuse for an evil purpose of a power which belongs to man for the attainment of good. It is because a man has misused his powers that he deserves to be deprived of them or restrained in the use of them.

Is this not the genuine sense of retribution? In so far as a man has turned his powers towards evil, it is at once evident that he deserves to be restrained in their exercise until he has learned to use them rightly, or even, if the evil be irremediable, to be deprived of them altogether. It will be recalled that Plato, in his myths of judgment, takes a similar point of view. Imprisonment, in particular, is readily construed as a restraint upon the liberty which a man is misusing. Retribution, then, is not a crude tit for tat but a restraint put upon human activity which has been corrupted by being devoted to evil.

The full measure of reward or punishment due to a man for his deliberate actions and their result upon his character does not, of course, fall within the province of the state; this belongs rather to his Creator. But the state is entitled to take cognisance of the evil wills of its citizens in so far as they conflict with that establishment of justice in social relations which is the primary purpose of the state. Obviously where possible, it is better to reform than merely to repress. Practically, therefore, the reformative aim remains the chief consideration in the treatment of the wrongdoer, but what needs emphasis is that no one would be entitled to undertake the forcible reformation of the wrongdoer unless he were really a wrongdoer, unless he had by the misuse of his powers made himself morally liable to social coercion. Whatever new restraints are put upon him, and some restraint upon liberty is involved in even the mildest of reformative establishments, are penal measures which cannot be justified without regard to his past wrong act and its effects upon himself.

This is not, then, a plea for neglecting the factors of reformation and deterrence or for making punishment harder. It is a plea for the proper understanding of retribution as the primary ground of punishment and as setting the limits within which social coercion can legitimately be exercised for the purposes of reformation and deterrence. On a superficial view it seems kinder to think of reformation alone and to forget about retribution, but in the end this is to forget moral responsibility and to incur the danger of looking upon men in the same light as animals to be trained to any pattern which appears desirable. It is impossible to take a just view of punishment unless we remember that the normal adult has a certain ultimate responsibility for his deliberate actions and, if he acts wrongly, deserves his punishment. This recognition is due to the dignity of the human person.

D. J. B. Hawkins.

A CASE FOR ADMINISTRATIVE TRIBUNALS*

EVERYTHING indicates that after this war the field and scope of public administration will be notably greater than it has been up to the present war. Though many of the restrictions which have come into existence as a necessary result of war conditions will sooner or later go, we can nevertheless take it for granted that in the post-war period public authorities will be concerned with many affairs which up to the present war were regarded as being beyond the reach of bureaucratic control. The private life of individuals will be exposed much more to intervention by officialdom than has hitherto been the case. Whether we like it or dislike it, this will be a fact, and will find expression in one form or another in all states, the United Kingdom not excepted.

If, with this growth of public administration, the classic rule of law, which, inspired by the shining British example, has become an indispensable element in the life of all democracies worthy of the name, is to be preserved, this will mean a considerable increase in the bulk of administrative law. For every new power possessed by a public authority to intervene in any aspect of a citizen's life must be firmly anchored in the legal order and as precisely defined as possible, so that arbitrary action on the part of authorities can be checked to the greatest possible degree.

The enhanced influence of public administration which will result from these developments must be counterbalanced by the provision of a greater degree of protection for the citizen's individual rights. The more rights a public authority has to direct and limit the individual and lay obligations upon him, the greater on the other hand must be the facilities afforded to him to protect himself against its possible abuses, against a wrong or exaggerated interpretation of its powers, against any *excès de pouvoir*. The protection of liberties as a whole will be attended to by Parliament. The protection of the individuals must, however, be provided by courts of law.

With this we are brought to the root of the whole question. I would contend that the ordinary civil judiciary will not be capable under changed conditions of concerning itself with this protection to an adequate degree, and that it will therefore be necessary for this purpose to create everywhere a regular system of special administrative justice.

Why are courts of civil law not fully capable of dealing with this task? There are several reasons.

The first and foremost is that the methods of civil procedure are entirely inappropriate to the equitable solution of conflicts arising out of the relation between individual citizens and public authorities. In both cases, of course, the procedure must involve the application of rules of law, which have to be interpreted in accordance with similar methods and principles. The fundamental approach to the problem is, however, very different in the two cases. In a civil *litis contestatio* there are only the conflicting private interests of the contesting parties to be considered. In an administrative dispute a private and a public interest, or various public interests, must, as a rule, be weighed against each other. To cope successfully with the latter task requires a rather different functional conception of law and its relation to society than that entertained by a civil judge, dealing as

* See also, on this subject, Alibert, the French *Conseil d'État* (3 MOD. L. R., 257).—ED.

he does almost exclusively with private litigations and the principles of civil law. This is all the more so as the rules of modern administrative law must needs be more elastic than those of civil law.

Here we touch the second reason why the present ordinary law courts would not seem to be the most suitable organs for adjudicating on public law relations. The whole schooling, practice, and tradition, the whole system of work and thought of a civil law judge, is centred in the narrow circle of what Sir Cecil Carr has recently described (speaking of the English system) as "common law faith in an orthodox judicature."[1] This "historic philosophy of the common law" (to use the words of Professor Laski without necessarily subscribing to all his views on the subject)[2] is hardly capable of contributing to a correct estimate of, and understanding for, the wider issues involved in administrative adjudication. Briefly, the present civil law judges of any country, however brilliant the standard of their legal knowledge, do not seem to me to be the right kind of people to adjudicate upon public law matters. For to be a good public law judge one has to have a thorough practical knowledge of the whole machinery of public administration, both central and local, of how it works, how it deals with individual citizens, how it meets their needs and complaints, and of course of its spirit and traditions as well. One must understand how the relation of the public authority to the individual citizen is shaped and developed in day-to-day administrative practice, and all the delicate complications which are involved. We need not dwell upon the fact that attendance at the bar, and sitting on the Civil Court's benches do not provide much help in acquiring this kind of knowledge.

Connected with the above two reasons is the unavoidable question of specialisation. Even to-day it seems to be impossible to master all branches of law with any real degree of efficiency. Hence, in most countries, various civil courts of special jurisdiction have been established, while in addition the high civil courts are invariably divided into several benches, each of which adjudicates on a different matter. This, however, will be still more accentuated in the post-war period when, owing to the expected enormous growth of administrative law, such knowledge as that mentioned above will be beyond the reach of human capacity. We cannot, therefore, expect a civil law judge to have anything but a very general knowledge of administrative law.

Furthermore, civil procedure is far too formal and cumbersome to deal with questions of administration in which, in the paramount interests of democracy itself, a decision ought to be reached as speedily as possible. Although it may undergo a gradual process of simplification, it will even then retain a certain amount of formal rules, many of which are superfluous, and some even prejudicial to the smooth and swift operation of administrative justice.

Finally, there is the thorny problem of procedural expenses. I do not speak about England, where, according to the united views of the experts, litigation expenses are considered as being excessively high and as over-ripe for reform. But even in those countries where civil litigation is much cheaper than in these isles and can hardly be made cheaper still, it is yet too expensive to afford a real and effective protection for the citizen's rights against public authorities. For to secure for the individual an adequate

[1] In his article on Administrative Adjudication in America in the *Law Quarterly Review*, October, 1942.

[2] *Parliamentary Government in England*, p. 370.

defence against arbitrary official actions the administrative judiciary must be open to all, not only in theory, but in practice, i.e. it ought to involve as little expense as possible. In fact it ought to cost next to nothing, and should only penalise by an appropriate fine the frivolous raising of complaints.

All this shows that courts of ordinary civil jurisdiction are not a suitable forum for cases of administrative law. It is for this reason that various states on the European continent have established long ago special tribunals for dealing with such cases. As is well known, they originated in France and it was the French *droit administratif* and *Conseil d'État* which were so strongly attacked by Dicey. Yet the idea of special administrative justice caught on, and was fundamentally developed further in Central Europe, in individual German states, and in Austria. Its growth and evolution corresponded there with that of the constitutional state, and its victorious fight against absolutism and the Police State. Administrative justice was thus in Central Europe the product of the fight of its peoples against a despotic government, and consequently became one of the chief symbols of the triumph of law over arbitrariness.

It is on the vast, lengthy, and altogether successful experience of this Central European system of administrative justice that I base my case for administrative tribunals in general. (I dare speak here of a system, because in spite of various differences which might in actual practice be important, all these courts of administrative jurisdiction in Central Europe are rooted in the same principles and display the same basic characteristics which are quite distinct from those characterising the French system.) These tribunals, working as they did until 1918 under most trying conditions (in states of a basically anti-popular and anti-democratic character), proved to be worthy of the task entrusted to them. When, after 1918, democracy swept away the decrepit governments of pre-war Central Europe and cleared the way for democracy, these tribunals, reorganised and with powers greatly enlarged, became the main protectors of individual rights, and of the citizen's democratic freedoms, and thus the main pillars of the democratic rule of law. And they remained such until the shadow of dictatorship swooped down once more on one after the other of the states of that much-disputed region of Europe. It would occupy much space to review here in detail the achievements represented by the work and organisation of these courts of administrative justice. Only by way of illustration I shall describe the main principles of the Czechoslovak Supreme Administrative Court, which has been one of the very best, of its species.

The Court consisted of several benches, each composed of one President and four judges. Simpler cases, however, could be decided by smaller benches of one President and two judges. All the members of the Court were appointed by the President of the Republic on the suggestion of the Cabinet. They were invariably chosen out of the best experts in various branches of constitutional and administrative law, advice being taken on this matter from the First President of the Court.

All the Court's judges were appointed for life and could be deprived of their offices only by a decision of the disciplinary senate of the Court itself (for breach of their duties). They were fully independent, being bound by statute and customary law only, and having the right to examine the validity of governmental decrees (corresponding to British Orders in Council). Thus they were exactly in the same position as judges of the highest courts of common law. Their rank and pay were equal to those enjoyed by the judges of the Czechoslovak Supreme Court (the highest

organ of civil and criminal jurisdiction in the Republic—corresponding to the Judicial Committee of the House of Lords).

The competence of the Court extended to all cases in which a person asserted that his rights were violated by an unlawful decision or measure taken by an administrative authority—with the exception of cases which came under the jurisdiction of common law courts. It was further called upon to adjudicate on any citizen's complaints regarding the violation of his political rights as guaranteed by the Constitution.

The administrative authorities against whose decision the appeal to the Court could be made comprised all the organs of the central and local administration, including the Head of the State himself and all the Ministries.

When the Court found that the claim was justified it cancelled the decision of the administrative authority, which was then bound to issue a new one along the legal lines given by the Court's judgment.

If the Court arrived twice at the same legal opinion regarding a legal question, and if its opinion differed from that of the administration, the President of the Court was entitled to lay this question before an enlarged senate of the Court, composed of a President and eight judges. If the judgment of the Court was here upheld, the legal opinion was published in the Official *Gazette*, and thereafter became binding on all the offices of the State administration and on the Court itself, unless and until it was changed by a still larger quorum.

Finally, the Court was also called upon to decide whenever conflicts of competence arose between any office of the central State administration (ministries) and a provincial self-governing body. Thus the Court acted also as legal protector of provincial self-government against possible inroads of the central administration. It thereby fulfilled another very important function in upholding the democratic rule of law.

As to the actual work of the Court, it decided some 6000 cases of the most varied character in the course of a year. There was hardly any branch, however unimportant, of public administration and finance which was not represented in the Court's transactions. Any attempt to draw a more detailed picture of its activities is out of the question here, since it would involve a survey of the whole of Czechoslovak administrative law.

The Court's impartiality was also beyond any doubt, and was generally recognised, not only by the members of the legal profession, but by laymen and parties alike. In 7803 out of 28,947 cases, which were decided by the Court in 1931–35, the administration's decisions were annulled by the Court in favour of individual claimants. This alone shows both how impartially the Court acted and what an important function it was called upon to perform.

The quality of its work was also beyond reproach. Its judgments were very elaborate and were always provided with an exhaustive legal explanation. Published in the excellent collection of leading cases, they became a practical handbook of administrative and financial law. Not only the Court's *rationes decidendi* but also its *obiter dicta* exercised an invaluable influence on the attitude of the whole of the civil service to public law.

Although the competence of the Czechoslovak Supreme Administrative Court went further in the protection of individual rights against administrative acts than many other continental legal systems, the general principles of administrative jurisdiction were similarly well developed in most continental countries. Generally speaking, it was the French *Conseil d'État*

which served as a model for the separation of a system of administrative courts from a system of ordinary courts.[3] Administrative jurisdiction became well developed and established in Germany too, and it is only under the Nazi regime that the existence of administrative courts has largely lost its meaning and their competence has been reduced to insignificant proportions; for Nazi philosophy rejects the whole idea of a judicial check upon governmental and administrative activities, and is bound to regard the elaborate system of administrative courts as a waste of time and personnel.

The German system owes its existence largely to the efforts of the famous political scientist, Rudolf von Gneist, who ironically enough was inspired by his study of the English legal system. What impressed him was not, of course, the existence of administrative courts—unknown to English law—but the participation of lay judges in the administration of justice. The German system of administrative courts became accordingly characterised by a combination of lay justice and professional administrative courts. In the lower instances, administrative jurisdiction was exercised by courts which were not very clearly separated from ordinary administration; for they consisted of the professional administrator assisted by lay assessors. Nazi legislation abolished first the democratic system of election of these lay assessors, and later the whole system of lay assessors. On the highest level each of the many German states had a fully independent administrative court, staffed with fully trained and independent judges with administrative experience and of equal rank with the ordinary court of the same level. Some German states, notably Hamburg, fully separated administrative courts from administration in all instances, and therefore came closer to the ideal of administrative justice.

There is little doubt that in all continental countries, whether it be France, Czechoslovakia or Germany, confidence in the value and impartiality of administrative courts, especially on the higher levels, has become firmly established. There would be little if any support for the abolition of these courts and a transfer of their jurisdiction to ordinary courts. Where the independence of administrative courts has been undermined, as in Nazi Germany, this is not a characteristic feature of administrative jurisdiction, but of the destruction of the rule of law which affects the ordinary courts no less severely.

In praising the Central European system of administrative justice in this fashion I do not by any means want to pretend that everything was perfect. Far from it. There were various deficiencies to be observed, differing according to each tribunal. The Czechoslovak Supreme Administrative Tribunal itself, for instance, whose work we have described above, was responsible for a number of drawbacks. But what is important is that the idea which originated and permeated it, the main lines of its organisation and the method and results of its work throughout two decades, were fully equal to the task entrusted to it: to give the best possible protection to citizens' rights without at the same time damaging the legitimate collective interests of the community.

It is now widely held by British experts[4] in these matters that Dicey's

[3] *Cf.* Alibert, 3 Mod. L. R., p. 257 *et seq.*, on the history and function of the *Conseil d'État.*

[4] Sir Cecil Carr, Prof. A. B. Keith, Prof. H. Laski, Sir John A. R. Marriott, and others.

attack upon French administrative justice was not altogether fair. Could he have known the system and work of present-day administrative justice in other continental states he would probably have changed his mind upon the subject very radically. As a matter of fact, the development which has since taken place in the English judicial system as well as in the attitude of many modern British writers on the subject, shows quite clearly that administrative adjudication has already started to penetrate into the until recently sacrosanct grounds of the English common law judiciary.

After having thus developed my case for administrative tribunals, I will conclude by adducing a few main principles on which in my opinion any good system of administrative justice ought to be based in order properly to fulfil its task.

(*a*) There must be as strong a guarantee of the independence of the administrative judges as of the regular judges. They must enjoy the same prerogatives of irremovability, pay, and promotion.

(*c*) The whole procedure must be rendered as speedy and as inexpensive as possible. For this reason there should be regional administrative courts in various parts of the country. These would do most of the ordinary work, while only the most important cases and some appeals from lower courts should be dealt with by a supreme administrative court.

(*d*) Each court should have several benches, each dealing with a different kind of subject, so that the highest possible degree of specialisation may be achieved.

(*e*) The decisions of the Supreme Court should of course be binding upon lower courts and upon the administrative authorities as well.

(*f*) The most important findings of the Court should be published in a well-arranged collection which would have its permanent place on the desks of all the civil servants and local government officials concerned.

(*g*) There should be provided as a help against the administration's inaction, some sort of an administrative writ of *mandamus*.

(*h*) Judges of the administrative courts should be selected from persons who combine a thorough knowledge of administrative law and legal procedure with an all-round practical knowledge of public administration.

(*i*) All the Courts' findings should be enforceable against the public administration in question, which would thus vouch for all its employees' acts and omissions.

Ed. Táborský.

THE BRITISH SUMMARY COURT AT WIESBADEN, 1926–1929

IN view of the impending occupation of Germany by Allied military forces, the institutions and experiences of the first Allied Occupation are of renewed interest. In many ways the occupation of 1918–1930, which was only a partial occupation confined to the Rhineland, and was not concerned with "internal" German politics, such as the problems emanating from National Socialism, differs greatly from the coming occupation: according to recent announcements, the whole of Germany will be occupied this time, and the occupation forces will intervene very considerably in "internal" German affairs; for example, Nazi organisations will be dissolved and Nazi legislation abrogated. On the other hand, Germany as a whole will be divided into an American, a British, and a Russian zone (as last time the Rhineland was divided into a British, a French, a Belgian, and—up to 1923—an American zone of occupation); it seems likely that again the various occupying powers will, to a very large extent, decide on the policy to be adopted towards the inhabitants of their respective zones.

According to the Rhineland Agreement, which was signed with the Treaty of Versailles on 28th June, 1919, the Inter-Allied Rhineland High Commission was empowered to ensure, by any means, the security and satisfaction of all the needs of the Armies of Occupation.[1] Under these terms, Military and Police Courts were set up in the four zones of occupation by the army in question. These worked parallel with the ordinary German courts; but only the Allied courts were allowed to try infringements of the ordinances of the High Commission, and all criminal cases in which any of the following categories were involved: members of the Armies of Occupation; their families if issued with a permit of the military authorities; and all persons employed by the Allied armies, unless they were German.[2] Offences had to be punishable according to the law of the occupying nation in question. In addition, the High Commission could transfer a case, whether civil or criminal, from a German to an Allied Court, if this was considered necessary in the interests of the Forces of Occupation.[3] Each occupying power was left to establish its own courts within its zone of occupation.

The British Summary Court sat at Cologne from 1919 to 1925 and, after the evacuation of Cologne, at Wiesbaden from 1926 to 1929, when the British Army was finally withdrawn from the Rhineland. The Court was usually presided over by an experienced British barrister holding temporary military rank. In all cases of minor importance, he sat as sole judge of law and fact, and only when a sentence of more than two years' imprisonment was likely to be imposed, were there from two to five other officers sitting with him. Another barrister, also of military rank, acted as prosecutor. He was supplied with evidence by a number of detectives working

[1] Article 3 of the Rhineland Agreement: M. Alléhaut, *Les Libertés dans les Pays Rhénans pendant l'Occupation*, Paris, 1925, p. 151.

[2] Article 3 of the Rhineland Agreement: *ibid.*

[3] Dr. A. Kobelt, "Die interalliierte Verwaltung der besetzten Rheinlande, 1918–1930," *Reich-Volksordnung-Lebensraum*, iv. Darmstadt, 1943, pp. 460–63; Major N. Parkes, "The British Summary Court in the Rhineland," *The Nineteenth Century*, cvii, 1930, p. 526; M. Alléhaut, *op. cit.*, pp. 41–42.

under the Deputy Provost-Marshal. The accused could be represented by counsel of any nationality, but British or German lawyers were the most usual. Proceedings were conducted in English as well as in German, with the help of official interpreters. There was no appeal against the judgments of the Summary Court. The Commander-in-Chief of the British Army of Occupation, however, to whom every verdict was submitted, could quash convictions and remit sentences.[4]

Only a small percentage of the cases tried by the British Summary Court were reported in the columns of *The Cologne Post and Wiesbaden Times*, the newspaper of the British Army of the Rhine. According to one author,[5] altogether about a thousand cases were heard in the Court during the four years during which it sat at Wiesbaden; but only about 80 cases are recorded in this newspaper. It can be assumed, however, that they include all the relatively more important and significant trials, and that an analysis of these cases would not be very different from an analysis of the total number for which no published records are available. For this purpose, I have divided the 80 cases into three categories: the clearly non-political cases; those with a possible political bias; and the obviously political cases.

The most common offence appears to have been that of reckless driving endangering the safety of a member of the British Army. Fourteen such cases are mentioned in *The Wiesbaden Times*. The fines imposed varied from 25 to 200 marks, or, alternatively, 7 to 14 days' imprisonment.[6] In one case, a driver who had inflicted bodily injury on a British officer through wilful negligence was sentenced to eight weeks' imprisonment.[7] In three cases, the accused were acquitted, one of them having been charged with manslaughter.[8]

Eleven cases are on record in which women, usually prostitutes, were tried for being in occupied territory contrary to a deportation order, or for being unlawfully on British military premises. It is interesting that some women were charged more than once with this offence, one woman twice, another three, and a third four times. The sentences imposed varied from one to nine months' imprisonment (the latter where previous convictions were cited), and one young girl was bound over.[9]

Eight trials for theft of British property are reported in *The Wiesbaden Times*. In two cases, the accused were found "Not Guilty," in two others they were bound over because of their youth.[10] The lowest sentence imposed was a fine of ten marks, for the theft of two planks, and the highest was one of six weeks' imprisonment on charges of theft combined with assault: the accused had stolen a rifle and, when pursued by a military policeman, had repeatedly attempted to fire on him, but the weapon was unloaded.[11]

In five instances people were tried for pretending to be a member or employee of the Occupation Forces. An English waiter charged with this

[4] N. Parkes, *loc. cit.*, p. 527.
[5] F. Tuohy, *Occupied 1918–1930*, London, 1932, p. 143.
[6] *The Cologne Post and Wiesbaden Times*, 30.10.27, 4.3.28, 17.5.28, 1.11.28, 17.1.29, 17.2.29, 22.8.29, 25.8.29, 19.9.29.
[7] *Ibid.*, 10.10.29.
[8] *Ibid.*, 28.7.27, 11.8.27, 7.7.29, 20.10.29.
[9] *Ibid.*, 8.4.28, 24.5.28, 6.12.28, 23.6.29, 29.8.29, 20.10.29.
[10] *Ibid.*, 26.4.28, 16.6.29, 29.8.29.
[11] *Ibid.*, 12,7.28, 18.10.28, 17.1.29, 13.10.29.

offence was acquitted; a German was sentenced to three months' imprisonment.[12] Another German was sentenced to nine, three, and nine months' imprisonment respectively, on repeated charges for this offence, having previously been sentenced to five days' detention by the British Court for failing to obey an order of the Deputy Provost-Marshal, and to various other sentences by German courts.[13]

Four cases were tried in which burglars had broken into houses inhabited by British officers. Their sentences varied from three to twelve months' imprisonment; one receiver of stolen goods was discharged. The persons concerned had usually had previous convictions for the same offence.[14]

On two occasions people were charged with trading in dutiable articles imported free of duty for the use of the British Army. Fines of 500 and 1,000 marks respectively (alternatively, six and four weeks' imprisonment) were imposed on the offenders.[15] The proprietor of a café was charged with having British soldiers on his premises during prohibited hours and fined 25 marks.[16]

All these 46 cases, out of a total of 80 reported by *The Wiesbaden Times*, are clearly non-political offences which only accidentally affected members or the interest of the Army of Occupation.

With regard to a second category of offences (25 cases), it is doubtful whether the offender was prompted by any anti-British feeling or not. Usually, the reports in *The Wiesbaden Times* do not provide any evidence on this point.

Twelve cases of assault on British nationals by Germans are reported, often arising from drunkenness or public-house brawls. Owing to conflicting evidence in two of these cases, the accused was found "Not Guilty."[17] In another case, a German, who had thrown beer at a British soldier and hit him on the head with a beer glass, was sentenced to six weeks' imprisonment.[18] Another man was fined 50 marks for detaining in a café, pending the arrival of the Military Police, two soldiers who refused to pay their bill.[19] An epileptic who, when very drunk, had fallen against a British sentry and acted in an indecent manner, was fined 60 marks.[20] A man who, when drunk, had struck a British lady with a walking-stick, was sentenced to ten days' imprisonment.[21] Two Germans who had struck and kicked an N.C.O., not realising that he was a British soldier, were each sentenced to one month's imprisonment.[22] A driver, who, having collided with an officer's car, struck him when he demanded his papers (not knowing who he was), tried to push him off the running board and insulted him, was only fined 110 marks (or three weeks' imprisonment)[23] A German who had thrown stones at a British car was fined 40 marks; and another, who had thrown potatoes at a passing

[12] *Ibid.*, 26.9.26, 1.4.28.
[13] *Ibid.*, 6.9.28, 20.1.29, 24.1.29.
[14] *Ibid.*, 14.8.27, 8.1.28, 29.7.28, 28.10.28.
[15] *Ibid.*, 7.10.28, 17.3.29.
[16] *Ibid.*, 9.5.29.
[17] *Ibid.*, 10.5.28, 2.5.29.
[18] *Ibid.*, 16.6.29, 20.6.29.
[19] *Ibid.*, 9.5.29.
[20] *Ibid.*, 17.5.28.
[21] *Ibid.*, 15.8.29.
[22] *Ibid.*, 5.9.29.
[23] *Ibid.*, 8.7.28.

officer's car, annoyed by its blinding headlights, was fined 60 marks.[24] A woman who had seized the little daughter of a British soldier and thrashed her with a stick, unaware of her nationality, was fined 20 marks; while another woman who had held the little girl was discharged.[25] Perhaps the most serious case of assault was that of three Germans who had set upon an N.C.O., knocked him down and brutally kicked him on the head, merely because he had asked the reason for an obscene remark called after him in English as he passed them with a lady; two of them were sentenced to six weeks' imprisonment, and the other to three weeks.[26]

Four cases of insulting behaviour towards British nationals accompanying the Army of Occupation are on record, two of them arising out of billet quarrels. A titled lady, who had insulted an N.C.O. and his wife by using "several obnoxious German terms, usually associated with the language of the gutter," was fined 20 marks.[27] A man who had called his British billetee *sale cochon*, and later assaulted a Military Policeman, was also fined 20 marks; his son, who had spat in the billetee's face, was fined 50 marks.[28] A Wiesbaden railway official had rudely ordered British ladies, sitting in the station waiting-room in evening dress, to put on their cloaks, and had failed to salute the officers accompanying them; he was fined 200 marks (or one month's imprisonment).[29] A man who had followed an officer's wife in the street was sentenced to three weeks' imprisonment.[30]

Three cases tried were offences against the billeting regulations. One man was tried because he did not grant his billetees "the necessary facilities for the comfortable occupation of their quarters" and was found "Guilty," but sentence was postponed to enable the parties to reach an agreement.[31] Two farmers, who had refused to make billets available for troops during manoeuvres, were fined 60 and 100 marks respectively.[32] A café proprietor, who had obstructed an N.C.O. in the execution of his duty and unlawfully detained him for ten minutes by locking a door, following a disturbance in the café, was acquitted.[33]

Five Germans were tried for being in unlawful possession of arms, never in any quantity. A young man, aged nineteen, found in possession of a revolver, was bound over.[34] The others were sentenced to fines varying from 25 to 100 marks (or ten to thirty days' imprisonment), and one of them to six weeks' imprisonment.[35] In none of these cases is the political affiliation of the accused reported, nor the motive for the retention of the weapons.

In hardly any of the 25 cases in this second category of offences does *The Wiesbaden Times* mention a clear anti-British or pro-German motive for the offence. If this tendency had been very obvious, it would probably have counted against the accused and been mentioned in the report. On the other hand, in five of the assault cases, and in one of the cases of

[24] *Ibid.*, 26.9.26, 8.9.29.
[25] *Ibid.*, 26.9.29.
[26] *Ibid.*, 11.7.29, 14.7.29.
[27] *Ibid.*, 16.12.28.
[28] *Ibid.*, 13.3.27.
[29] *Ibid.*, 22.12.27.
[30] *Ibid.*, 28.2.26.
[31] *Ibid.*, 27.9.28.
[32] *Ibid.*, 7.10.28, 11.10.28.
[33] *Ibid.*, 9.6.29.
[34] *Ibid.*, 9.9.28.
[35] *Ibid.*, 13.3.27, 17.5.28, 18.11.28.

insulting behaviour, it is clear that there can have been no anti-British feeling since the offender in these instances did not know that he was dealing with a British subject.

The third and last category of offences consists of nine cases of infringement of ordinances of the Rhineland High Commission, committed with a clearly political motive.

Two of these cases concerned the wearing of forbidden, para-military uniforms. In August, 1927, the Wiesbaden *Reichsbanner* (a republican and pacifist organisation) held a procession in honour of the Weimar Constitution: this had the character of a military demonstration, involving marching in military formation with two bands, many of the participants wearing Army belts. The vice-president of the local *Reichsbanner* was tried for this offence. He denied that military marches had been played and that the procession had been of a military nature since women and children had taken part. He stated that, although he had given instructions that the belts were to be taken off, he could not remember whether these had been complied with. He was fined 200 marks.[36] The other case concerned the wearing of the Nazi uniform which was prohibited by the Rhineland High Commission on 26th May, 1929. Five days later, a Wiesbaden Nazi attended a party meeting in full uniform although he was well aware of the ban. He was arrested by a British detective and fined 100 marks.[37] This was the only trial reported involving a Nazi.

In the same year a Wiesbaden bookseller was fined 100 marks because he had exhibited, in his shop window, two *Schlageter* pamphlets which had been banned in occupied territory by order of the High Commission.[38]

All the other political cases concerned the playing or singing of the German national anthem, which was forbidden by order of the High Commission; it was often combined with demonstrations against the Allied soldiers present. Two such cases occurred in 1926. In a Rüdesheim restaurant the band, persuaded by a guest, played the anthem; the audience rose, sang and demonstrated against two British soldiers present; the musicians were fined.[39] In Bingen, a German sang the anthem in a café, signed to a British corporal to stand up and shook him when he failed to do so; he was charged with assault and fined 300 marks (or one month's imprisonment).[40]

Three further cases of the playing of the forbidden anthem occurred in 1928. In the first, the mayor of Königstein and the conductor of the Kurhaus orchestra were tried for playing it in a public garden, crowded with civilians and soldiers. The conductor stated that the mayor had told him that he was allowed to play the anthem and was found "Not Guilty." The mayor was fined 100 marks (or 14 days' imprisonment).[41] A few days later, the proprietor of a Wiesbaden restaurant made a speech to his guests, followed by the anthem; a British soldier sitting in the restaurant was forced to leave. When questioned, the café proprietor declared: "the mayor of Königstein paid a fine of 100 marks for this, and if I want to sing '*Deutschland über Alles*,' I shall sing it." In court he denied having used these words and attributed the singing to the excitement over the

[36] *Ibid.*, 21.8.27.
[37] *Ibid.*, 9.6.29.
[38] *Ibid.*, 20.10.29. Schlageter was a German ex-officer who had been court-martialled and shot for sabotage by the French in the Ruhr in 1923.
[39] *Ibid.*, 19.9.26.
[40] *Ibid.*, 26.9.26.
[41] *Ibid.*, 14.10.28.

flight of the *Graf Zeppelin*; he was fined 120 marks (or 14 days' imprisonment).[42] A Wiesbaden police official, who, carried away by the excitement caused by the news of the Zeppelin's arrival, had played the anthem in another restaurant, but had been stopped by the proprietor and a waiter before the end of the first verse, was only fined one mark.[42]

The last and most interesting of these cases took place in 1929. In the Wiesbaden Kurhaus gardens, a musical medley was played which contained recognisable portions of the forbidden anthem. The crowd rose and applauded enthusiastically, whereupon the anthem was played as an encore. A French officer was dug in the ribs and made to stand up. A leading Wiesbaden police official and one of his subordinates were tried. The latter stated that he had submitted the programme to a Civil Affairs representative who had approved it, but that he could not swear whether or not he had mentioned the anthem to him. The police official declared that he had asked his subordinate if he had obtained permission for the playing of the medley, and had been assured that he had done so; the encore was merely a repetition of the last part. Both were found "Not Guilty."[43]

These are all the political cases mentioned in *The Wiesbaden Times*. The motive in most of them seems to have been German national, rather than anti-British, feeling, perhaps coupled with irritation about certain orders of the Rhineland High Commission issued to check nationalist demonstrations. On the whole, most of the cases seem to have been of a trifling nature; the number of political or semi-political offences seems to have been surprisingly small, and the large majority of the cases tried was certainly absolutely non-political. Of course, the years 1926–1929, with which this paper is concerned, were years of relative tranquillity compared with the years of the revolution, the inflation and the occupation of the Ruhr. According to Tuohy, however, most of the cases tried by the British Summary Court during the early years at Cologne, were also of a non-political character;[44] there were "not a few prosecutions bearing on secret meetings of the forbidden *Stahlhelm*," but on the whole he noticed a "total absence of political prosecutions."[45]

It seems worth considering whether, after this war, the trial of wholly non-political and trifling offences should not be left to ordinary German courts, once these are working again, and whether Allied jurisdiction should not be confined to offences of a political character and to the more important cases involving Allied interests.

F. L. Carsten.

[42] *Ibid.*, 21.10.28.
[43] *Ibid.*, 18.8.29, 22.8.29.
[44] F. Tuohy, *op. cit.*, pp. 143–46.
[45] *Ibid.*, pp. 147–48. For a *Stahlhelm* case tried in 1924, see N. Parkes, *loc. cit.*, p. 532.

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* After this article had gone to press, the first trials of German civilians by a British military court in occupied Germany were reported in the newspapers. Eight Germans, seven of them women, were tried for crossing the German-Dutch frontier in contravention of a law made by the authority of the Supreme Commander; the penalties imposed varied from a fine of 20 marks to six months' imprisonment. As at Wiesbaden, an officer, a barrister in civil life, was the president of the court, and decided each case himself; the proceedings were conducted in English, with the help of an interpreter.

DEFINITION OF INVENTION IN PATENT LAW*

I HAVE read with great interest the article on the "Definition of Invention in Patent Law," by Mr. H. E. Potts, which appeared in the MODERN LAW REVIEW of July 1944. Mr. Potts' clear exposition of the difficulty of differentiating between "inventions" and "mere improvements" is most helpful to the patent lawyer, and ultimately I agree with his suggestion that royalties only and not a monopoly should be awarded to patentees in cases where the contribution to the art made by the inventor involves only a limited degree of ingenuity. I cannot, however, follow entirely the reasoning by which Mr. Potts arrives at this solution of the problem.

Briefly, Mr. Potts seems to say this: The task of drawing the line between a real patentable invention and a mere unpatentable improvement, in other words between "day" and "night," is too difficult for the Judge; consequently the Judge, when he finds himself in the "penumbra between light and darkness," should give a limited relief in the form of royalties but no monopoly. In fact, however, Mr. Potts puts on the Judge the task of drawing two lines, namely, first the line between an unpatentable improvement and an invention which deserves a royalty only, and second the line between a minor invention deserving a royalty only and a real invention deserving a monopoly; in other words, the Judge under Mr. Potts' scheme has to draw first the line between night and dawn, and second, the line between dawn and daylight. Mr. Potts stresses the fact that discontinuity is exceptional in nature; however, when the scientist is faced with a continuous line or process he, too, finds it necessary to define units in terms of which he measures it. The lawyer is bound to do the same; see the quotation from Mr. Justice Holmes given by Mr. Potts. Black-out regulations must draw a more or less arbitrary line between day and night, and the patent law must draw a more or less arbitrary line between an unpatentable improvement and a patentable invention.

In my view, the solution of the problem suggested by Mr. Potts can be better reached by a different reasoning, viz., there are three categories of contribution to technical progress, namely: (1) Mere improvements; these deserve no special reward. (2) Inventions involving a limited degree of ingenuity; these deserve a royalty only. (3) Inventions involving a substantial ingenuity; these deserve a monopoly. Consequently it is desirable to introduce into the Patent Act a clause to the effect that for inventions involving a limited degree of ingenuity the patentee should be entitled to a royalty only. The decision on this point should preferably be put into the hands of the Comptroller of the Patent Office, or it might be left to the Judge in infringement proceedings. The reason why the patentee should receive a royalty only is, however, not the fact that it is too difficult for the Patent Office or the Court to draw borderlines, but the fact that a royalty only, and not a monopoly, is the adequate reward for the invention covered by the patent.

Referring to your footnote to Mr. Potts' article, I certainly agree that making partial awards in borderline cases is very much in line with the trends of modern practical jurisprudence as evidenced in the Hire Purchase

* We have received this comment from Mr. Peter Meinhardt on the article on this subject which appeared in our last issue.—THE EDITOR.

Act, the Family Provisions Act and the Frustration Act. The relevant provisions in these modern Acts are, however, not based on a theory of "judicial defeatism" which assumes that it is too difficult for the Judge to draw borderlines. On the contrary, these Acts greatly extend the discretionary powers of the Judge and entrust him with the solution of problems which older statutes attempted to solve in the body of the Act. The modern Acts, however, also expect the Judge first to make up his mind whether the facts fit into the legal category visualised by the Act. For example, under the Frustration Act the Judge must first examine whether there is a frustrated contract and whether a party has, by reason of any thing done by the other party, obtained a valuable benefit; having drawn the borderline and ascertained that the plaintiff is on the right side of it, the Judge is then free to fix at his discretion the extent of the sum recoverable by the plaintiff. In the same way, according to my suggestion, and in fact also according to Mr. Potts' proposal, the Court has first to ascertain that there is a patent covering an invention which is more than a mere improvement but does not involve sufficient ingenuity to deserve a monopoly; having drawn the borderline and ascertained the category, the Judge is then free to fix at his discretion the extent of the royalty. Just in the same way as the Frustration Act does not relieve the Court of the difficult task of deciding whether or not there is a frustrated contract, Mr. Potts' and my suggestions do not relieve the Court of deciding whether or not there is an invention deserving a monopoly; in many cases this is the crucial question for the patentee, while the amount of the royalty which may be due to him is of secondary importance.

A true example of partial relief in a borderline case can be found in Section 32A of the Patent Act which provides that the Court in its discretion may give partial relief to the patentee if some claims of the patent are invalid but others are valid. However, as the law stands at present, the patent is considered invalid and the patentee can obtain no relief if each claim of the patent contains matter which is partially new and partially old. I should like to suggest that in the case of a claim containing old as well as new elements the Judge, at his discretion, should be in a position to make a partial award in favour of the patentee in respect of the new elements contained in the claim. Such a clause would remedy the hardship now suffered by a patentee who is deprived of all protection even for a very useful invention if he has "opened his mouth too wide" by including partially old matter in the claim.

STATUTES

The Finance Act, 1944

This Act is of particular interest since there is implicit in it the statutory recognition of the fact that, with taxation at its present high level, the State is in effect a partner with industry. In the realm of applied science this country has lagged well behind the U.S.A. and Germany, though it is, perhaps, unsurpassed in discoveries in the field of natural science. To encourage industry to undertake the research necessary to enable this country to compete on equal terms with the rest of the world, special provision is made in Part VI of the Act for an allowance in the computations of business profits of expenditure on "Scientific Research."

The allowance extends to all *revenue* expenditure related to a particular trade whether made direct by the taxpayer or paid to a recognised scientific research association or university, approved by the appropriate Research Council (sects. 27 and 31). As is well known, the Income Tax Acts prohibit any deduction in computing profits for expenditure of a *capital* nature, but sects. 28 and 29 provide that, where such expenditure is incurred on scientific research related to a trade, the amount thereof may be deducted in equal instalments in the computation of profits for the five succeeding years. The concession, however, is not operative until a date to be determined by Parliament, nor does it include the cost of acquiring any *rights* arising out of research. The definition of "scientific research" is interesting, viz. "any activities in the fields of natural or applied science for the extension of knowledge." Another encouragement to industry was the Chancellor's promise to introduce later a Bill dealing with further allowances in respect of expenditure on new plant and buildings and as regards wasting assets; under the existing law no deduction from profits may be made under these heads.

The remaining provisions of the Finance Act are of a more technical nature though one or two are worth noting; there are, of course, the usual increases in, and variations of, indirect taxation. Sect. 24 removes a hardship experienced by authors who are charged to income tax in full *in a single year* in respect of lump-sum payments for their work; this lump sum may now be spread over not more than three years, in equal instalments, according to the length of time the author was engaged on the making of his work. In the realm of Excess Profits Tax, relief is given to small businesses by an increase of £1000 in the optional "minimum standard" of profits whereby the excess is measured (sect. 32). The tax avoider's persistent and non-civic activities are further circumscribed by sect. 33, which strengthens the provisions of the original E.P.T. "tax avoidance" section—sect. 35 of Finance Act, 1941—by enacting that "the avoidance or reduction of liability to the tax" shall be deemed to be *one of the* main purposes for which any transaction was effected instead of its having to be *the* main purpose, as heretofore. Various technical amendments are made by Part VI to those provisions of the Finance Act, 1940, relating to the charge to Estate Duty in respect of a deceased's benefits from certain companies.

Under the present law regarding trading with the enemy, income or property belonging to "enemies" is placed under the control of the Custodian of Enemy Property—see Trading with the Enemy Act, 1939, the Defence (Trading with the Enemy) Regulations, 1940, and orders made thereunder. While under such custodianship, the beneficial ownership of both income and property is, so to speak, in suspense so that there is no power to charge any one thereon either to income tax or to the death duties. The Fourth Schedule of the Act provides for the charge and recovery of tax, or repayment as the case may be, upon the custodian who is regarded as standing in the shoes of the "enemy" for this purpose.

A. FARNSWORTH.

Restrictions on Diplomatic Privileges

On 17th April, 1944, the British Government announced that "until further notice they will be unable to permit—

"1. The transmission or receipt by diplomatic missions in this country of any telegram which is not in plain language.

"2. The dispatch of any diplomatic bag which has not been submitted to censorship; and the receipt of such a bag dispatched after that date until it has been censored.

"3. The departure from this country of official couriers or diplomatic and consular representatives or any members of their official or domestic staff." (*The Times* newspaper, 18th April, 1944.)

The measures touch upon what is usually described as the diplomatic envoy's freedom of communications, and also upon the traditional fiction of his extra-territoriality and upon his exemption from the police jurisdiction of the receiving country.

On 17th April, 1944, the position in English municipal law was as follows—

1. Sect. 1 (1) of the Aliens Restriction Act, 1914, gives power to His Majesty to impose by Order in Council certain restrictions on aliens in time of war, of imminent national danger or of great emergency.

2. This power has been extended by sect. 1 (1) of the Aliens Restriction (Amendment) Act, 1919, to the effect that it is exercisable "at any time."

3. These emergency powers were limited to a period of one year after the passing of the 1919 Act, but have been continued by the Expiring Laws Continuance Acts and are, at present, in force until 31st December, 1944, under the Expiring Laws Continuance Act, 1943.

4. Sect. 14 (1) of the 1919 Act provides that "nothing in this Act contained shall be construed as imposing any restriction or disability on any duly accredited head of a foreign diplomatic mission or any member of his official staff or household."

5. Under the Acts of 1914 and 1919 an Order in Council (the Aliens Order, 1920) was made. Its Article 22 (1), in accordance with sect. 14 (1) of the Act of 1919, exempts foreign diplomats from its operation. "(Nothing in this Order shall apply to any duly accredited head of a foreign mission, etc.")

6. Through Regulation 20A of the Defence (General) Regulations, 1939, inserted under the Emergency Powers (Defence) Act, 1939, by Order in Council, S.R. & O., 1940, No. 682, and amended by Order in Council, S.R. & O., 1941, No. 1774, the powers of the Crown in Council under the Act of 1914 were further extended.

7. The Diplomatic Privileges (Extension) Act, 1941, extended to members of foreign allied governments and authorities established in the United Kingdom, to some members of their official staff and to diplomatic envoys accredited to them, the immunities and privileges of the envoy of a foreign Power accredited to His Britannic Majesty.

The following were the steps by which the change in the law was effected—

An Order in Council (S.R. & O., 1944, No. 463), dated 17th April, 1944, made under the Emergency Powers (Defence) Acts, 1939 and 1940, added the following paragraph to Regulation 20A of the Defence (General) Regulations—

"(3) Notwithstanding anything in section fourteen of the Aliens Restriction (Amendment) Act, 1919, or in any other enactment or any rule of law, *any provision may be made by an Order in Council under the said section one* with respect to heads of foreign diplomatic missions and members of their households and staffs which could be made by such an Order in Council with respect to any other alien."

The striking feature of this Order in Council is that it contains an enabling provision to make another Order in Council. The "said section one" is sect. 1 of the Act of 1914. The new paragraph gives power to the Crown in Council to make provisions in relation to foreign diplomats which, heretofore, it could make only in relation to aliens other than accredited heads of foreign diplomatic missions, etc. It gives, in other words, power to amend Article 22 (1) of the Aliens Order, which provides that nothing in the Order shall apply to heads of foreign diplomatic missions, etc. The official note as to S.R. & O., 1944, No. 463, says: "This Order enables all or any of the provisions of the Aliens Order, 1920, to be applied to heads of diplomatic missions, their households and staffs." It is submitted that this is not quite accurate. The Order does not alter either the Aliens Order in general or its provision that nothing in it shall apply to extra-territorial persons. What is altered by the Order is the statute under which the Aliens Order was made. It makes possible the amendment of the Aliens Order in such a way as to abolish all obstacles set up by statute or case-law that have hitherto prevented its extension to foreign diplomats.

The amendment of the Aliens Order, 1920, was, accordingly, made through another Order in Council, dated also 17th April, 1944, i.e. the Aliens Order, 1944 (S.R. & O., 1944, No. 465). It was made in pursuance of sect. 1 of the Aliens Restriction Act, 1914, as amended by or under (*sic*) any subsequent enactment. The Aliens Order, 1944, is thus a "child" of the Aliens Restriction Act, 1914. (*Cf.* Sir Cecil Carr, *Concerning English Administrative Law*, pp. 88, 90, 91.) But at the same time it is also a "child" of the Order in Council, S.R. & O., 1944, No. 463. As the latter is a "child" of the Emergency Powers (Defence) Act, 1939, the Aliens Order, 1944, is also a grandchild of this Act, the delegated legislator thus playing havoc with the—by now traditional—family relationship between the Enabling Act (parent), Orders in Council (children), and the products of sub-delegation like ministerial orders and directions (the grandchildren of the Act). The Direction made by the Home Secretary under the Aliens Order, 1944, S.R. & O., 1944, No. 482, which is to be discussed presently, thus becomes a great-grandchild to the Emergency Powers (Defence) Act, and grandchild both to the Aliens Restriction Act and the Defence (General) Regulations.

At the end of Article 22 (1) of the Aliens Order, 1920, which exempts foreign diplomats from its application, Article 3 of the Aliens Order, 1944, inserts the following proviso—

"Provided that the Secretary of State may direct that all or any of the provisions of this Order shall have effect in relation to all or any of the said persons either without modification or subject to such modifications as may be specified in the direction."

It is this provision which does what the explanatory note to the Order, S.R. & O., 1944, No. 463, attributes to the latter, viz. it enables "all or any of the provisions of the Aliens Order, 1920, to be applied to heads of diplomatic missions, their households and staffs," while the actual application of the Aliens Order to foreign diplomats was effected by the Direction, made by the Home Secretary on 17th April, 1944, S.R. & O., 1944, No. 482. It orders that those provisions of the Aliens Order which impose restrictions on the landing and embarkation of aliens (Articles 1 and 18), those which provide for the inspection and detention of aliens (Art. 3), and those which relate to the identification of aliens landing and embarking (Art. 15), shall,

together with ancillary provisions, apply to duly accredited heads of foreign diplomatic missions, etc.

The restrictions on landing cannot possibly be said to interfere with diplomatic privileges, as, even without any new provision, no foreign envoy could claim to be admitted to the United Kingdom as of right. The restrictions on embarkation do, of course, hinder the freedom of movement of foreign envoys, prohibiting them to embark without leave of an immigration officer. But in the present circumstances a foreign diplomat could not, at any rate, leave the United Kingdom without the British authorities providing travelling facilities for him.

Of particular interest for our investigation is Article 3 (7) of the Aliens Order, which now also applies to foreign diplomats. Under it any alien landing or embarking must, on being required to do so by an immigration officer or constable, make a declaration as to whether or not he is carrying or conveying any letters, written messages or memoranda, or any written or printed matter, including plans, photographs and other pictorial representations. If so required, he shall produce them and the officer may search the alien and his baggage with a view to ascertaining whether the alien is carrying or conveying any such letters, etc. The officer may examine and for the purpose of the examination detain the letters, etc. Through the application of this provision to diplomatic personnel the "inviolability" of diplomatic bags and their exemption from all interference is, of course, suspended. But even this is not by far so revolutionary an innovation as it appears *prima facie* to be. International law does not, e.g. claim the exemption of envoys from custom duties. Most municipal legal orders, including the law of the United Kingdom, allow diplomatic envoys, etc., to receive, within certain limits, goods intended for their own private use. But they do so by way of courtesy only. (*Oppenheim-Lauterpacht*, Vol. I, § 394, *Satow-Ritchie, A Guide to Diplomatic Practice*, § 414, *Feller* and *Hudson, A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, pp. 216 *et seq.*) "The private baggage of foreign diplomatic couriers . . . is, *as a general rule*, to be passed without examination . . . examination should not be resorted to *unless* there are good grounds for suspecting an attempt to smuggle . . . When an Ambassador, Minister or Chargé d'Affaires is accredited to this country by a Foreign Power . . . the Treasury . . . direct the Commissioners of Customs to observe the "usual respect in the examination of the baggage . . ." The term "usual respect" does not exempt from payment of duty, but may be taken to mean *the slightest necessary examination.* (*Ham's Year Book*, 1930, Vol. I, "Customs," pp. 50–51.)

Through the Home Secretary's Direction those provisions of the Aliens Order, 1920, which are "ancillary to any of the provisions aforesaid" have also been applied to foreign diplomats. This raises the important question whether the provisions of the Order making the contravention of its provisions a criminal offence (Article 18), and those giving powers to arrest without warrant any person who acts or is reasonably suspected of having acted or being about to act in contravention of the Order (Article 19) are ancillary to the provisions previously mentioned. "Ancillary" has been defined as "supplemental . . . making more effective a remedy . . ." (*Smith* v. *Smith*, [1925] 2 K.B. 144 per Bankes, L.J., at p. 149.) Two views are possible on this question.

In support of the opinion that Articles 18 and 19 of the Order are ancillary to the provisions expressly mentioned, the fact may be adduced

that they are subordinate to them, merely helping to make the provisions of Articles 1, 1B, 3, and 15 effective, and that without them the persons affected could not be compelled to abide by them or be effectively prevented from contravening them. According to this view, mere prohibitions without power to punish non-compliance would be incapable of safeguarding those overriding interests of safety of the realm, which have led to the making of the Orders in Council and the Home Secretary's Direction. It would be difficult indeed to find any other provisions of importance in the Aliens Order, 1920, which would come under the head of "ancillary provisions," except Articles 18 and 19.

In favour of the opposite view it may be maintained that the mere fact that foreign diplomats are subjected to the provisions regarding, e.g. the examination of their baggage is in itself an effective measure towards preventing the disclosure of information. If it had been the intention of the delegated legislator to abrogate the exemption of foreign diplomats from the criminal jurisdiction of this country, he would have done so by express words. And finally, an Act of Parliament must, if possible, be construed in such a way that it is not repugnant to the established rules of international law, e.g. the rule relating to the extra-territoriality of accredited diplomatic envoys, there being a presumption that Parliament does not intend to infringe these rules. This ought also to apply to the construction of instruments of delegated and sub-delegated legislation. If this second interpretation is correct, a person enjoying diplomatic privileges would not in contravening Articles 1, 1B, 3, and 15 of the Aliens Order, 1920, commit a criminal offence.

"The American and Soviet missions, together with the missions of the fighting Dominions, are understood to be excluded from the measure." (*The Times* newspaper, 18th April, 1944.) The exemption of the American and Soviet representatives is not expressed in the Home Secretary's Direction. The High Commissioners of the Dominions are not aliens and do not come under the provisions of the Aliens Order.

The Control of Communications Order (No. 1, 1944) (S.R. & O., 1944, No. 347, though made under Regulation 11 of the Defence (General) Regulations only a few weeks before the introduction of the restrictions on diplomatic privileges (25th March, 1944), contains express provisions exempting postal packets dispatched "on the official service of the Chief Diplomatic Representative in the United Kingdom of a foreign power" from the prohibitions imposed on the transmission of packets by post (Paragraph 1A (*c*)). It also provides that its prohibitions regarding the transmission otherwise than by post shall not apply to prohibited articles conveyed or sent by an accredited representative on the official service of the Chief Diplomatic Representative in the United Kingdom of a foreign power. (Article 2 (*d*).) These provisions have, so far as the writer is aware, been neither repealed, nor modified.

EGON SCHWELB.

After this note had gone to press the Foreign Office issued an announcement (*The Times* newspaper, 20th June, 1944) that the heads of all diplomatic missions had been notified of the removal of the restrictions, imposed on 17th–18th April, 1944, as from midnight, 19th–20th June. On 19th June, 1944, the Home Secretary by a Direction (S.R. & O., 1944, No. 701) revoked his Direction, dated 17th April (S.R. & O., 1944, No. 482, *supra*).

The Orders in Council (S.R. & O., 1944, Nos. 463 and 465, *supra*),

altering the Aliens Restriction Act, 1914, and the Aliens Order, 1920, respectively, are, of course, not affected by the revoking Direction. The power to direct that all or any provisions of the Aliens Order shall have effect in relation to heads of diplomatic missions, etc., remains vested in the Home Secretary.

The Control of Communications Order dated March 25, 1944 (S. R. & O. 1944, No. 347) has on July 4, 1944, been revoked and superseded by the Order S. R. & O. 1944, No. 776. The change does not affect the provisions referred to above.—E.S.

House of Commons Disqualification (Temporary Provisions) Act, 1944

The resignation by Sir Samuel Hoare (now Lord Templewood) of his seat as a member of Parliament on the ground that his continuous absence as Ambassador at Madrid—he has been there four years—makes it impossible for him effectively to represent his constituents, drew attention to the unsatisfactory position which has grown up as a result of the above Act, which was renewed recently for three years. Under it the Prime Minister is able to grant up to twenty-five certificates enabling members to hold offices of profit under the Crown without disqualification.

As Mr. Pethick-Lawrence said in the debate on the most recent of these Acts, that of 1944, members "have never regarded this proposal as satisfactory . . . It is not a good plan that the Government should be able to employ members of Parliament in offices of profit under the Crown"[1] Although the Act was renewed there was considerable criticism: the main point being that the intention had been to enable members to take up temporary appointments in connection with the war, and not long-term offices such as those of Ambassador, or High Commissioner in the Dominions which are in effect permanent appointments[2] (Sir R. Cross and Mr. Malcolm MacDonald have been absent on certificates under the Act for almost as long as Sir Samuel Hoare.) As Mr. Granville pointed out, a stage has been reached where a number of constituencies are "completely disfranchised"[3]. Sir Samuel Hoare has recognised this and resigned: will his colleagues follow his lead? R. S. T. C.

PARLIAMENT

White Papers

In the last number of the MODERN LAW REVIEW[4] the modern practice of ventilating Government policy by means of White Papers was discussed, and reference was made to the growing practice of departmental consultations with outside interests before the Government's proposals are submitted to Parliament, and it was suggested that M.P.s are getting exigent and querulous about their rights.

This view is supported by a discussion on the same matter which occurred in connection with the Town and Country Planning Bill.[5]

[1] Official Report, 10th Feb., 1942, 1972.
[2] *Ibid.*, Mr. Shinwell, 1982.
[3] *Ibid.*, 1975.
[4] Vol. VII, No. 3, p. 144.
[5] House of Commons Official Report, Vol 401, No. 105, 11th July, 1944.

Mr. Arthur Greenwood complained that the White Paper on Redevelopment and the Bill had been issued simultaneously, which was unfair treatment of Parliament. He contrasted the procedure in connection with Education and Social Security. He went on to complain that not only had the Bill been flung at Parliament without a White Paper, but that there had been discussion only "of the most cursory kind" with the local authorities. "It is a cardinal principle which I think must be admitted by all, that prior to legislation there should be full and intimate discussion with those who will be charged with carrying out the law"[6] This complaint was echoed by other members, and it will be noted that it is the exact opposite of that voiced by Mr. Bowles[7] in connection with the Minister of Health's proposals for post-war housing. In reply, the Parliamentary Secretary to the Ministry (Mr. Strauss) pointed out that in 1931 there had been no consultation with the local authorities about the draft Bill. He considered that "there are cases when it is desirable on some points to get the views of the House of Commons before negotiating with too many outside bodies"[8] He added, however, that consultations had in fact taken place both with individual local authorities and with associations of local authorities.

Consultations with Members

During July the Minister of Home Security (Mr. Herbert Morrison) and his Parliamentary Secretary (Miss Ellen Wilkinson) held meetings with members whose constituencies had been involved in the enemy's attacks by means of flying bombs. These meetings were held in a committee room and were open to all who wished to attend, and the discussions were on a basis of secrecy, though the Speaker afterwards ruled that this obligation was a matter of honour, and not of Parliamentary custom and privilege.[9]

Although the general opinion seems to have been that the meetings were very useful, there was a considerable divergence of view as to their constitutionality. Some members, like Sir Herbert Williams and Mr. Buchanan, took the view that such meetings, which are in effect meetings of the House without the presence of the Speaker, and without the observance of the rules and standing orders, are definitely an unconstitutional innovation. Mr. Eden denied this, and said that it was a common practice for Ministers to meet members upstairs and that "it would be a great mistake if that practice were stopped." Mr. A. Bevan supported this, and said that the great advantage of such meetings was that Ministers could reinforce themselves with administrative and even service personnel as had been done in 1940. But Mr. Eden denied all knowledge of the 1940 precedent, not only on his own behalf but on that of the Prime Minister. He considered that service personnel should not be present.

It seems fairly clear that meetings of this type are in fact very different from those previously held "upstairs," and should perhaps be regarded as a war-time anomaly. It is obviously an undesirable practice that meetings of the whole House should be held under ministerial chairmanship rather than under the Speaker, or some independent member, and this aspect was emphasised by several members at question time on 21st July, 1944.[10]

R. S. T. C.

[6] *Ibid.*, col. 1617.
[7] Mod. L. R. as above, page 145.
[8] Official Report, col. 1692.
[9] Official Report, 21 July, 1944, p. 482.
[10] *Ibid.*, 486.

NOTES OF CASES

Patents—Invalidity Caused by Linguistic Errors

In 1895 (*Cassel* v. *Cyanide*, 12 R.P.C. 232) the Court of Appeal, "with reluctance" gave judgment for the defendants although they had infringed the revolutionary MacArthur Forrest process for the extraction of gold from ores by selective treatment with a cyanide solution. Claim 2 called for the use of a *dilute* cyanide solution in limited amount and this claim was held valid for novelty, invention and utility. However, the plaintiffs lost the case because they could not justify claim 1. This claim was not restricted to dilute solutions and was held invalid since the wording was broad enough to cover concentrated solutions which would dissolve base metals as well as gold and would not possess the novel selective properties. The invalid claim made the whole document ineffective.

The decision was right but the law was clearly wrong. The 1919 Patents Act partially alleviated this monstrous state of affairs in which a patentee of a novel, inventive and useful claim could not restrain a proved infringement of claim 2 because claim 1 was too wide.

Probably writers in 2000 will make a similar comment on the case of *Unifloc Reagents, Ltd.* v. *Newstead Colliery, Ltd.* (60 R.P.C. (1943), p. 165). After twenty-six days the Court decided that the claim was novel, inventive and useful, and that it was infringed but that the patent was invalid because the words "neutral salt" occurring in the claim were ambiguous.

The claim covered the process of separating particles from dispersions such as fine coal from coal washery water, by the addition of a gel obtained by adding an aqueous paste of any amylaceous material (starch) to a hot aqueous solution of *a neutral hydrated metallic salt*, agitating and heating till a thick and gummy paste is obtained.

Examples of suitable neutral salts were given, e.g. a mixture of calcium chloride and zinc chloride.

The plaintiff contended that a "neutral" salt was one which did not change the colour of litmus paper, which is red in acid solution and blue in alkaline solution. There is a neutral range which is violet.

The defendant contended that there was no generally recognised classification of metallic salts into acid, neutral and alkaline and that neutrality must be judged by the *p*H value, i.e. a neutral salt is one in which the *p*H value is about 7, and the hydrogen ion concentration is equal to the hydroxyl ion concentration.

Bennett, J., held that the effect of the evidence was clear as a whole—

> "There is no classification of salts which has as one of its classes a class called neutral. The evidence of Dr. Cox does not prove that amongst chemists the phrase 'neutral salt' would be understood to be a salt which when dissolved in water and tested with a piece of neutral litmus paper would produce no perceptible change in the colour of the litmus paper."

The Judge stressed "uncertainty" though the headnote uses the words "insufficient or ambiguous." Perhaps ambiguity can be regarded in general as the most dangerous pitfall of the patentee.

> "Having regard to the evidence, a specification which prescribes the use of a neutral salt in the manufacture of the gel fails, by reason of the uncertainty of the meaning of the word 'neutral' to describe

and ascertain the manner in which the invention is to be performed. A specification in which the scope of the monopoly claimed is defined by the use of the same word does not, in my judgment, clearly ascertain the scope of the monopoly claimed, because of the uncertainty of the meaning of that word. The specification leaves the public quite uncertain what the patentees claim. It leaves them quite uncertain what salts they may or may not use without infringing the patent in suit."

Bennett, J., marked his disapproval of the unnecessary destructive criticism of the defendants on other issues by making no order as to costs.

On the law as it stands, the decision is not surprising. The present position is that the danger of ambiguity has become a nightmare to patentees. In spite of sympathetic statements by learned judges on the difficulty of drafting patent specifications, these documents are submitted to such drastic linguistic and experimental criticism that it is remarkable for any document to survive.

It seems unfair that a patentee who has succeeded in substance all along the line should fail because of a fault which is really irrelevant to the issue between the parties. The reason for this draconian severity is perhaps that for generations the common law ideal of certainty has paralysed the judicial reader of specifications so that the doctrine of benevolent interpretation has been of little avail to the patentee.

The remedy would appear to lie in an extension of the powers of amendment and of judicial discretion with reasonable liberty to cure ambiguity. Under such extended discretion, it is possible that the ambiguity of the term "neutral salts" might have been cured by explanation or disclaimer, possibly by applying the *ejusdem generis* rule to the particular salts mentioned in the specification.

The present law provides (sect. 25 of the Patents Act) sixteen grounds of revocation in addition to any other ground upon which a patent might have been repealed by *scire facias* before 1884.

It is suggested that the handicap on the genuine inventor is too great, and that the present witch-hunts for ambiguity should be deprecated. The public interest would be better served if the Patent Office were given greater powers of refusing illegitimate claims, and the Courts were then empowered to construe these restricted patents more generously.

HAROLD E. POTTS.

Charitable Trusts—Entails

A desultory perusal of recent Law Reports has given the impression that it is high time that the legislature took in hand the law relating to charitable trusts. This impression is finally confirmed by the decision of Cohen, J., in *Re Compton*, [1944] 2 All E.R. 255.

In that case, a testatrix had directed that certain moneys should be "invested in trustee stocks under a trust for ever . . . for the education of Compton and Powell and Montague children . . . not over the age of 26 years." The children in question were subsequently defined as the descendants of three named individuals, all of whom, if this is relevant, would appear to have been very adequately blessed with this world's goods. At the date of the testatrix's death there were twenty-eight children who qualified.

It need hardly be said that the will was a home-made one, and it is thought that few lawyers would have ventured to advise the testatrix

to try a perpetual trust of this nature. Nevertheless, her temerity was rewarded; the learned judge felt himself constrained by authority to uphold the bequest as a valid charitable trust.

It is submitted that there are two basic considerations behind this branch of the law—

1. That the tying up of funds in perpetuity is contrary to the public interest. Hence the Rule (or rules) against Perpetuities.

2. That charitable trusts are so beneficial to the public that in their case the anti-social consequences of tying up funds in perpetuity no longer apply.

What, then, is a charitable trust? In the classic definition of Lord Macnaghten in *Income Tax Commrs.* v. *Pemsel* (1891), A.C. 531, it is a trust for the relief of poverty, the advancement of education, the advancement of religion, or *other* purposes beneficial to the community not falling under any of the other heads. In other words, the basic consideration is public benefit, i.e. as stated above, such trusts must be beneficial to the public notwithstanding that they may tie up property in perpetuity.

How does this apply to the trust in question? Is it seriously suggested that the tying up of property for ever for the education of the descendants of three wealthy individuals is in the public benefit? The learned judge himself does not appear really to have thought so, but he felt himself constrained by authority so to hold. It is no part of the writer's purpose to examine these authorities closely; circumstances preclude his doing so. But it must be pointed out that the learned judge's decision goes further than any previous case quoted in the report, and is largely based on *obiter dicta* (for in view of the grounds of decision adopted on appeal they are no more) of Romilly, M.R., in *A.-G.* v. *Sidney Sussex College*, 4 Ch. App. 722.

There is no doubt that a trust may (both in law and good sense) be a valid charitable trust notwithstanding that it is only for the direct benefit of a limited class of the community (e.g. for the education of poor Jews, or, it is submitted, "for the reformation of Nazis"); the *direct* beneficiaries may be a limited class, but the whole community has an interest in their welfare. But these examples are a long way from a case where the only beneficiaries are the descendants of particular individuals, who are neither indigent, nor sick, nor subject to any other disabilities.

The cases by which the learned judge felt bound do not, it is submitted, support the view that such a trust is charitable. The trust was not for the benefit of Education in general (and therefore of the community), but merely for the benefit of Compton and Powell and Montague children. It benefited private, not public, interests.

Moreover, the consequences of this decision seem startling. It is true that at the time when the will came into effect the class to be benefited numbered twenty-eight. But it is submitted that the number is irrelevant; the trust was to go on for ever, and while to-day there may be twenty-eight, to-morrow there may be only one. And if one can educate descendants of three people in perpetuity, why not of only one? It is submitted that if this decision stands, a trust "for the education of my descendants" must equally be valid. Nor, it seems, need the age of the beneficiaries be limited as in the Compton Case; education, as even the Army has found, should continue throughout life. In other words, a trust in perpetuity to use the income for the education of all or any of my descendants during their lives is valid. And if that is not driving a coach and horses through the Rule against Perpetuities, what is?

Moreover, while the floodgates are opened in this direction, other trusts, which really are for the public benefit, are declared invalid. A testator, it would seem, can validly tie up property in perpetuity for the education of his descendants, but cannot leave property to "such charitable institution or institutions or other charitable or benevolent objects . . . as my executors . . . may select." The highest Court has finally decided that the latter bequest is not a valid charitable trust (*Chichester Diocesan Fund* v. *Simpson* (1944), 2 All E.R. 60) despite the fact that the testator seems clearly to have manifested a general intention of benefiting the public. (See the powerful dissenting judgment of Lord Wright.)

It is submitted that a comparison of the latter case with *Re Compton* shows that the Courts have deviated far from the considerations of public benefit on which this branch of the law is, or should be, based. The subject requires early review by the Law Revision Committee and, subsequently, by Parliament. The matter is closely allied to Education and Social Security—topics which are now receiving the attention of the Legislature.

A further point also arose in *Re Compton*, and is not devoid of interest. The will directed the executors to settle money on "A and his heirs male." It was held that A took an interest in the nature of estate tail male under sect. 130 (1) of the Law of Property Act, 1925. Counsel for the A.-G. as *amicus curiae* argued that under sect. 130 (2) A should take an absolute interest. Sect. 130 (2) is not very happily worded, but it has always been taken to mean that entailed interests can now only be created by the strict words of limitation appropriate for this purpose in a pre-1926 non-executory deed (i.e. to A in tail or to "A and the heirs of his body"). Any other words of limitation will create interests equivalent to those which would have been created before the Act in the case of personal estate (i.e. absolute or life interests, but *not* entailed interests because before the Act they could not exist in the case of personalty). The intention of this sub-section was clearly to do away with the distinction between formal deeds on the one hand and wills and instruments on the other by permitting the creation of entails only by the use of strict words of limitation.

This appears to be a clear case for the application of sect. 130 (2). A devise to "A and his heirs male" in a non-executory settlement would not have created an entailed interest. One therefore has to decide what it would have created prior to 1926. This is a pure question of interpretation, but presumably the answer is an absolute interest, as was argued on behalf of the A.-G.

The learned judge nevertheless held that sect. 130 (2) did not apply, apparently on the ground that it only affected formal settlements, and not executory directions to settle, and he therefore felt himself free to give effect to whatever he considered to be the testatrix's intention. In so deciding, he apparently gave weight to the words used in the will which *directed* the executors *to* settle. It may be, therefore, that the decision would not apply to every will, though in the past wills have been treated as identical in this respect with executory instruments.

In any event, the effect of the decision is to defeat the intention of sect. 130 (2). If the decision is followed, entails can be created by executory instruments without the use of the strict words of limitation, and the distinction between executory and non-executory instruments still remains. Indeed if, as the judgment suggests, wills may either be regarded as executory or not according to their wording, confusion is rendered worse confounded.

On neither point, therefore, can the decision be regarded as satisfactory, and one wishes that it would be taken to appeal. Unfortunately, appeals are rare in the case of originating summonses; the executors have obtained directions and protection, and are doubtless content. So the decision is likely to become a precedent; it will be interesting to see to what extent practitioners follow it.

L. C. B. Gower.

Charity—Trusts "for the benefit of the community"

In his classic judgment in *Special Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583, Lord Macnaghten divided the term "charity" in its legal sense into four main divisions, viz.: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and *trusts for other purposes beneficial to the community*, not falling under any of the preceding heads. It has long been established that a mere benevolent intention is not *ex necessitate* for the benefit of the community; the "public interest" must be promoted to an important degree, *cf.* trusts for improvement of the physical efficiency of the Army (*Re Gray*, [1925] Ch. 362), to promote anti-vivisectional activities (*Re Foveaux*, [1895] 2 Ch. 501) and to protect places of natural beauty, etc. (*Re Verrall*, [1916] 1 Ch. 100). As regards so-called "*public* trusts," Lindley, L.J., in *Re Macduff*, [1896] 2 Ch. 451—approved in *Att.-Gen.* v. *National Provincial Bank*, [1924] A.C. 262—laid it down that a trust of general public utility must be of a *general charitable nature* within the Statute of Elizabeth in order to come within the definition; for this reason a body established with the object of carrying on essential public services in the event of strikes was held—*Trustees for the Roll of Voluntary Workers* v. *Inland Revenue* (1941), Sess. Notes 64—not to be a "public trust," since its main objects were wholly political.

Where the main purpose of a trust is the benefit of its members, the benefit to the community being incidental, it is not a charity, see *Re the Headmasters Conference* (1925), 41 T.L.R. 651. A trust whose main purpose is the advancement of the science of agriculture is, however, a charity, even though its members may get some personal benefits, see *Inland Revenue* v. *The Yorkshire Agricultural Society*, [1923] 1 K.B. 611. In *Corporation of Foreign Bondholders* v. *Inland Revenue*, [1943] 2 All E.R. 670, the primary object of the appellants was "to watch over and protect the rights and interests of holders of public securities wherever issued, but especially of foreign and colonial securities issued in the United Kingdom." It was contended that the protection of the interests of persons who held foreign bonds was beneficial to the community to whose general advantage it was that the obligations of foreign debtors should be enforced; the fact that members might benefit should not avoid the general charitable purpose *vide:* the *Yorkshire Agricultural Society* case, *supra.* As, however, the *primary* object of the Corporation was to enable creditors in this country to obtain payment of debts owing to them by foreigners, it was held impossible to read into the objects of the Corporation any general charitable purpose within the scope of the preamble to the Statute of Elizabeth; the appeal was, accordingly, dismissed.

A. Farnsworth.

Act of God—Rylands v. Fletcher—Statutory Liability

Outside Insurance Law, the notion of "Act of God" as distinguished from "inevitable accident" is leading an increasingly precarious existence. The torrential rainfall which led to its introduction as an exception to the strict liability under the rule in *Rylands* v. *Fletcher*, in *Nichols* v. *Marsland* (1876), 2 Ex.D. 1, has remained its solitary example in the law of tort. The House of Lords refused to apply it to the somewhat similar circumstances in the case of *Greenock Corporation* v. *Caledonian Railway*, [1917] A.C. 556. Judges and textbooks alike regret to have to complicate the study of tort by a strained distinction between "Act of God" and "Inevitable Accident."[1] The Court of Appeal in *Makin* v. *L. & N.E. Railway*, [1943] 1 All E.R. 645, also refused to make the artificial distinction. The issue was the liability of the defendants as canal owners for the damage done through the escape of water from a collapsed embankment to the plaintiff's mill. The Peak Forest Canal Act, 1794, imposed upon the occupier liability for damage caused by the water flowing from the said canal ". . . or from any other accident. . . ."

Apart from an unsuccessful attempt to rely on a strained interpretation of the *eiusdem generis* rule, the defendants mainly stressed the distinction between "accident" and "Act of God," and argued that the latter stood in a category by itself. Lord Greene, M.R., with whom the other members of the Court agreed, considered this as "a refinement which is not justified by anything in this section." "Supposing the bank of the canal is broken by an ordinary flood, or supposing it is broken by an extraordinary flood, so far as the sufferer is concerned . . . if asked whether he had suffered damage as the result of an accident, would scarcely reply in the latter case in the negative and say: 'No, I have not suffered as the result of an accident. I have suffered as the result of an Act of God, because this particular flood cannot properly be described as an accident.'"

It is likely that, whenever occasion arises, Courts will continue to laugh the distinction out of court and thus gradually remove one more discrepancy between Common Law and common sense.

It is noteworthy that Lord Greene, in the same judgment, defined the position, apart from statute, as being that the proprietors who accumulated water on their land, could "escape from the ordinary liability based on . . . the rule in *Rylands* v. *Fletcher*, if they could show that water had escaped without negligence on their part. They would not . . . have been liable if water escaped through an Act of God, the intentional act of some third party, or by an act of the King's enemies." This lends welcome and authoritative support to the contention advanced by Dr. Stallybrass (in *Salmond*, 9th ed., sec. 149), and the present writer (in 1 Mod. L. R., 62, also 4 Mod. L. R., 308) that the rule in *Rylands* v. *Fletcher* is nothing but an application of the modern principle of negligence.

W. Friedmann.

Status of Refugees

The status of German refugees in the sphere of the civil law of this country has been the subject-matter of two decisions in the High Court during the past year.

In the case of *In re D.* (*Infants*), [1943] Ch. 305, the question arose whether an English Court could appoint a guardian for four children

[1] *Cf.* Winfield, Textbook, 2nd ed., s. 16.

whose parents, German Jews, were still on enemy territory at the time of the decision.[1] In this case Bennett, J., following the principles set out in *Johnson* v. *Beattie* (1843), 10 Cl. & F. 43, and *Nugent* v. *Vetzera* (1866), L.R. 2 Eq. 704, decided that an English Court has jurisdiction to appoint a guardian wherever the infant is resident in England irrespective of his domicil or nationality and notwithstanding the fact that the child has no property in this country. It was held that this jurisdiction existed "where in all circumstances it is desirable that such an appointment should be made." In the present case Bennett, J., considered it sufficient that the authorities of the school at which the children were to be educated desired that there should always be a guardian resident in this country in respect of any pupil attending it.

The case of *May* v. *May and Lehmann* (1943), 169 L.T. 42, is, as far as can be seen, the first reported decision on the question of the domicil of German refugees. In that case a co-respondent in a divorce suit objected to the jurisdiction of the Court on the ground that the petitioner was not domiciled in this country at the time when the proceedings were commenced. The petitioner had been permitted to land in this country as a trainee on the condition that he should be required to leave this country after the completion of his training. Before the petitioner, a German Jew, had come to this country, an American immigration visa had been obtained for him from the American Consulate-General in Stuttgart, and in June, 1940, after having been trained in this country for more than a year, he allowed steps to be taken to have his American visa transferred from the Stuttgart register to the British register. Shortly afterwards he was interned until January, 1941, when he took up work again as a trainee with his previous employers. In January, 1942, the present petition was filed.

The question arose whether on these facts the petitioner had acquired a domicil of choice in England. Pilcher, J., held that the petitioner had not acquired an English domicil before his internment, as the steps which he allowed to be taken with a view to procuring for himself an immigration visa to the U.S.A. in June, 1940, indicated that at that time at least he had not formed a definite intention to settle down in this country. The learned judge also added that it was unlikely that the petitioner had formed such an intention during his internment, quite apart from the fact that there was "some authority for saying that a domicil of choice cannot be acquired whilst the individual concerned is under physical restraint."—However, the learned Judge held that the petitioner had acquired a domicil of choice in this country during the year that elapsed between his release from internment and the presentation of the petition. He was determined never to return to Germany, he had friends, relatives and regular employment in this country, and though he had taken no steps to inform the American Consulate that he did not intend to avail himself of the American visa when the turn of his quota number came, Pilcher, J., was satisfied that the idea of going to the United States had "faded from his mind," and that he had come to regard England as his home. Pilcher, J., thus decided that the petitioner was domiciled in England at the material time, although he had been resident in this country for a comparatively short time (three years, not four, as stated in the report).

[1] It may be noted that the Guardianship (Refugee Children) Act, 1944, invests the Home Secretary with the power to appoint a guardian in respect of infant refugees from the Continent. This enactment will no doubt simplify the procedure which appears to have become necessary in quite a number of cases and at the same time will save expense to the persons concerned.

It was held in *Boldrini* v. *Boldrini*, (1932) P. 9, that the fact that an alien is liable to be deported from this country under the Aliens Order, 1920, does not prevent him from acquiring an English domicil of choice. Pilcher, J., extended this principle to the facts of the present case where the condition endorsed on the petitioner's landing permit stating that the holder would be required to leave this country after the completion of his training was held not to affect the acquisition of an English domicil of choice once residence and *animus manendi* were proved.

It may well be that the decision in this case was prompted by the consideration of another point which was not expressly referred to in the judgment, namely, what would have happened if it had been held that the petitioner had not acquired an English domicil of choice. Whereas in a normal case it would have been possible for the petitioner to apply for a dissolution of his marriage to the Court of his domicil of origin, this alternative course is barred to the refugee for obvious reasons, and thus, he would not be able to obtain relief in matrimonial and similar questions where the jurisdiction of the English Court depends on domicil in this country. In other words, in vital questions of their lives, the refugees would be denied that "free and ready access to the Courts of Law" which should be granted to them under the Convention Concerning the Status of Refugees from Germany dated 10th February, 1938, and ratified by H.M. Government in the United Kingdom on the 26th September, 1938.

In *May* v. *May and Lehmann* a benevolent judge was able to find a way out of the dilemma on the facts of the case. It is respectfully submitted that this decision establishes that the great number of refugees from "Greater Germany" who have the intention of remaining in this country after the war are to be considered as having acquired a domicil of choice in this country whatever be the conditions on their landing permit. However, it should be realised that there are quite a number of cases where even with the best of intentions on the part of the judge it will be impossible to hold that a refugee has acquired a domicil of choice in this country, e.g. cases of political refugees who wish to return to Germany after the overthrow of the Hitler regime, and transmigrants who wish to rejoin their families overseas after the war. Unfortunately, the chapter of the 1938 Convention dealing with the legal status of refugees is based on the nationality principle in status questions such as it applies on the Continent, and does not take account of the different position in countries like England where status questions are governed by the law of the domicil. The underlying principle of this convention is no doubt that where a refugee is unable to assert his rights because in the normal course of events these could only be determined by German Courts, the Courts of the country where the refugee resides should give the required relief.

The question of the legal status of refugees is no longer a matter for a few individuals. The Hitler terror has brought tens of thousands of fugitives to this country, men and women who often require questions of their status, etc., to be determined. Especially in cases of matrimonial litigation where the English Courts claim that the courts of the domicil have exclusive jurisdiction, the difficulty may become acute. The courts of the domicil which according to the principles of English law may still be Germany, cannot be asked to give relief. It is respectfully submitted that, following the spirit of the 1938 Convention, wherever it can be shown that a person resident in this country and seeking assistance in cases where according to English law the courts of the domicil have exclusive

jurisdiction, would be barred from taking proceedings in the Courts of his nominal domicil through racial or political oppression by the Nazi terror, the Courts of this country should declare themselves competent to assume jurisdiction.

The further problem what law should be applied in such cases seems to be of less importance. Wherever the person whose status is in issue cannot be proved to have lost his German domicil of origin there appears to be no objection to apply German law to the case.[2] It is obvious that the English doctrine of public policy would assure that discriminating legislation of Hitler Germany could not be enforced here, and that in practice it would be the law of Republican Germany which would prevail in such cases. This would appear to be the more desirable as such a decision is more likely to be recognised by the law of the country where these refugees will ultimately sail, be it their new home overseas, or a Germany liberated from the Hitler regime.

F. HELLENDALL.

"Locus regit actum"

Some fundamental problems of the conflict of laws were raised by the decision of Bennett, J., in *Re Priest, Belfield* v. *Duncan*, [1944] 1 All E.R. 51. A British subject domiciled in England whose estate consisted solely of personal property made a will attested by two witnesses, one of whom was the husband of a legatee. According to English municipal law as laid down in Section 15 of the Wills Act, 1837, the legacy to the witness's wife was void. It so happened, however, that the testator had made his will when he was in Scotland. The will was formally valid as a holograph testament under Scottish municipal law. Nevertheless, it was held by the learned judge, that the witness's wife was not entitled to the legacy, on the ground that the testator had not intended to make a will according to the forms required by the law of Scotland.

The question which fell to be decided by Bennett, J., referred to the validity of a legacy, not to the formal validity of the will as such. It is elementary that the validity of a gift of movables contained in the will of a testator domiciled in England is primarily governed by English law in its totality. The learned judge disposed without difficulty of counsel's argument that the Act of 1837 did not apply to a will made in Scotland on the ground that according to its Section 35 the Act did not "extend" to Scotland. This, however, is the point where the real difficulties of the case begin. The validity of a legacy is, under Section 15 of the Act of 1837, made dependent upon the observance of a certain form, viz. the attestation by two witnesses neither of whom is the legatee or the legatee's spouse. The section is very emphatically not one which regulates the formal

[2] See, however, Loewensohn, *The Law of Domicil as applied to Refugees* (1941), 52 Juridical Review 28, at p. 36, who thinks that in such cases there is no law of the domicil to which the Court could refer, and who therefore pleads for the application of the law of residence. It appears doubtful whether the English Courts will follow this suggestion, as contrary to the question of jurisdiction where a real gap has to be filled, there seems to be no cogent reason for an exception to the general law to be made in this respect. Moreover, Dr. Loewensohn's attempt to justify his opinion by the Convention relating to the International Status of Refugees, dated 28th October, 1933, seems rather far-fetched, as this Convention expressly states that it is applicable to Russian, Armenian and assimilated refugees, whereas refugees from Germany and Austria are only dealt with by the 1938 Convention.

validity of wills. The "issue" between the parties[1] was the existence or non-existence of a legacy, not the "due execution" of a will. This main issue would not have to be characterised or classified as one of formal validity, so that those special legal principles which merely refer to "due execution," viz. the rule *locus regit actum* as embodied in Section 2 of the Wills Act, 1861 (Lord Kingsdown's Act), would—at first sight—not seem to be concerned with the case. It is, however, clear—and it was tacitly assumed by Bennett, J.—that the "attestation" contemplated by Section 15 of the Act of 1837 is one which is *required* in order to make the will formally valid. Whether it is required, is a question of the formal validity of wills. That question in turn must be answered with reference to those principles of Private International Law which dominate the issue of "form of wills." An attestation which is redundant because the will is capable of deriving its formal validity from a foreign system to which English Private International Law refers cannot be allowed to invalidate a legacy. Thus the issue of formal validity became a question necessarily incidental to the main question before the Court.

In its application to wills of personalty (including chattels real)—wills of real property are outside the rule in English law—the principle *locus regit actum* is, in this country, entirely the creation of a statute, viz. Sections 1 and 2 of the Wills Act, 1861. These sections provide that the rule is to operate in relation to a will of personalty made by a British subject "whatever may be the domicil of such person at the time of making the same or at the time of his or her death." The question arises whether compliance with the formalities prescribed by the *lex loci actus* suffices to make the will valid as a matter of substantive law, or whether such compliance can merely be pleaded in probate proceedings, so that *pro tanto—locus regit actum* would be a procedural norm addressed to the Probate judge and not applicable by any other Court, e.g. by a Chancery judge in proceedings concerning the validity of a legacy. In relation to Section 2—which applies to wills made in the United Kingdom—this question cannot be in doubt, for the section says that, if made according to the *lex loci actus*, the will shall "be held to be *well executed and shall be admitted . . . to probate*, etc." This section, therefore—the only one to be considered by Bennett, J., in the case under review—clearly admits the *lex loci actus* as a general alternative to the *lex domicilii* at the time of death, and is applicable in any kind of proceedings. The matter may, however, be doubtful as far as Section 1—the provision dealing with wills made out of the United Kingdom—is concerned, because that section merely says that a will made according to the formalities of the *lex loci actus* (or the *lex domicilii* at the time of making the will or the law of the testator's British domicil of origin, if any) "*shall . . . be held to be well executed for the purpose of being admitted . . . to probate, etc.*" It is arguable, though the argument is perhaps over-grammatical, that, under Section 1, the rule *locus regit actum* refers exclusively to probate proceedings, while under Section 2 the external validity of the will cannot be impugned either in a Probate Court or elsewhere if it conforms to the rule *locus regit actum*. This question may have to be answered one day by a Court—other than a Probate Court—confronted with a will of personalty made by a British subject outside the United Kingdom.

The problem, then, which Bennett, J., had to solve was neatly put: Does the operation of the rule *locus regit actum* depend on the intention of

[1] Cheshire, *Private International Law*, second edition, p. 30.

the party to submit to the *lex actus* or does the rule operate *ipso facto*, irrespective of the testator's state of mind?

As a general question of the Conflict of Laws this problem goes back to the seventeenth century. Paul Voet,[2] in stating the doctrine in relation to contracts, argued for the "subjective" theory. In his view, the rule *locus regit actum* is justified, "*quia censetur quis, semet contrahendo, legibus istius loci ubi contrahit, etiam ratione solemnium subjicere voluisse.*" Huber, however,[3] took the opposite view, and formulated the doctrine in an "objective" way: "*Cuncta negotia et acta tam in iudicio quam extra iudicium, seu mortis causa sive inter vivos, secundum ius certi loci rite celebrata valent, etiam ubi diversa iuris observatio viget . . .*"

Story[4] agreed with Huber, and dissented from the opinion of jurists like Paul Voet, Boullenois, and Hertius who based the rule on submission and tacit assent. On the contrary, he said, "the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation, to regulate all persons and property, and transactions within its own territory."

It would appear that, since Story's day, it has been customary, at least in this country, to formulate the principle "*locus regit actum*" as an objective principle of Private International Law,[5] i.e. as a rule of law the operation of which is not based upon the intention of the party or parties to the transaction. It comes into play whether or not these parties intended to make use of the *lex loci actus*. This is clear where the principle is in force in its imperative form, i.e. where the *lex loci actus must* be observed, as, for example, according to English law, in relation to marriage.[6] It should be no less clear where the rule is only permissive, i.e. where the *lex actus may* be resorted to, so that, e.g. a marriage settlement[7] or ordinary contract, whatever their proper law, would be extrinsically valid if made in accordance with the *lex loci actus*, even though the parties never intended that law to govern the formalities of their transaction. In short, the rule *locus regit actum* stands on the same footing as other doctrines of the conflict of laws which do not contain the subjective factor as an ingredient of their conceptual structure, such as the rules that—in certain limits—torts are governed by the *lex loci delicti commissi*, property rights by the *lex rei sitae*, the distribution[8] of an estate of movables or the dissolution of a marriage by the *lex domicilii*, or the corporate status of a corporation—in Anglo-American law—by the *lex incorporationis*. The rule cannot be compared with the doctrine of the proper law of a contract which, according

[2] *De Stat.*, Sect. 9, Ch. 2, n. 9, quoted Story, *Conflict of Laws*, Sect. 261, second edition, p. 343.

[3] *De Conflictu Legum*, No. 3, quoted from Llewelyn Davies, "The Influence of Huber's *De Conflictu Legum* on English Private International Law," *British Year Book of International Law*, 1937, p. 49.

[4] L.c., page 343.

[5] Dicey, *Conflict of Laws*, Rules 159, 182 (2). Cheshire, l.c., pp. 243–45. Similarly in Germany: Staudinger-Raape, Commentary to Art. 11 of *The Introductory Law to the Civil Code*, Vol. I, p. 186, where, however, it is stated that the rule does not apply if the party does not know that he happens to be in a particular country.

[6] *Berthiaume* v. *Dastous*, [1930] A.C. 79.

[7] *Guépratte* v. *Young* (1851), 4 De G. and Sm. 217. *Van Grutten* v. *Digby* (1862), 31 Beav. 561.

[8] But not the "administration" as Bennett, J., is reported to have said at p. 52 of the case under review.

to the now accepted principles of English Private International Law,[9] incorporates the express or implied choice of law by the parties, so as to compel the judge to apply that system of law which the parties intended to govern the construction and validity of their agreement. Nor does the rule stand on a par with the doctrine that the construction—as distinguished from the essential validity[10]—of wills is, in certain not too well-defined limits, governed by the law intended by the testator, a rule which, it will be remembered, is not confined to wills of movables,[11] but has been extended to wills of land.[12]

Neither of the two sections of Lord Kingsdown's Act which import the rule into the English Private International Law of wills of personalty bears any trace that the legislator intended to connect the operation of the Act with the existence of the testator's willingness to submit the formal validity of his will to any particular system of law. It is the objective fact that the will was made at a certain place—or, under Section 1, that the *de cuius* was domiciled in a given country at a given moment—which makes the observance of the law of that place or country a sufficient reason why the will should be formally valid. It is irrelevant, whether the testator wished to attract that system to his will, or even whether he was aware of it. In so far the Act stands in line with the general theory of Private International Law.[13]

The case under review demonstrates very clearly the usefulness of, and the practical necessity for, a rule which permits a party to employ the form of the law in force in the country in which he happens to act. The testator "used . . . a will form the formal parts of which indicate that it had been prepared for use by a Scottish testator." If he had the benefit of any legal advice, it was presumably that of lawyers more familiar with the law of Scotland than with English law. Viewed from a pragmatic rather than from Story's historical and doctrinal standpoint, the rule *locus regit actum*—whether statutory or customary—is meant to provide just for this type of situation. It comes to the rescue of a party who—unfamiliar with the formalities of the law of "his own" country, and unable to obtain legal advice on it—is induced or forced by circumstances to perform a legal transaction in a "foreign" jurisdiction.

The learned judge regarded it as relevant that, apart from using the

[9] *R.* v. *International Trustee, etc.*, [1937] A.C. 500. *Vita Food Products, Inc.* v. *Unus Shipping Co.*, [1939] A.C. 277.

[10] See, however, the problem raised by Breslauer, *Private International Law of Succession*, p. 129.

[11] Cheshire, l.c., p. 533. *Re Cunnington*, [1924] 1 Ch. 68.

[12] Cheshire, l.c., p. 552. *Studd* v. *Cook* (1883), 8 App. Cas. 577.

[13] The words used to express the principle in French and German law seem to be to the same effect: Code Civil Art. 47; alinéa 1: "*Tout acte de l'état civil des Français et des étrangers, fait en pays étranger, fera foi, s'il a été rédigé dans les formes usitées dans ledit pays.*" Art 170: "*Le mariage contracté en pays étranger entre Français et entre Français et étranger sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu etc.*" Art 999: "*Un Français qui se trouvera en pays étranger, pourra faire ses dispositions testamentaires par acte sous signature privée, . . . ou par acte authentique, avec les formes usitées dans le lieu où cet acte sera passé.*"

Introductory Law to the German Civil Code, Art. 11, para. 1: "*Die Form eines Rechtsgeschäfts bestimmt sich nach den Gesetzen, welche für das den Gegenstand des Rechtsgeschäfts bildende Rechtsverhältnis massgebend sind. Es genügt jedoch die Beobachtung der Gesetze des Ortes, an dem das Rechtsgeschäft vorgenommen wird.*" And see above Note 5.

Scottish holograph form, the testator also attempted to observe the English statute requiring attestation by two witnesses. Upon the evidence he found it "impossible . . . to conclude that the testator . . . intended to make an unattested holograph will disposing only of personal property which was to have legal operation and effect by force of the combination of the law of Scotland relating to holograph wills and Section 2 of Lord Kingsdown's Act," and he refused to regard the attestation by two witnesses as "a mere matter of chance and coincidence." It was what would, with great respect, appear to be a false analogy that induced the learned judge thus to revert to Paul Voet's "subjective" theory, and to link up the operation of Lord Kingsdown's Act with the testator's intention to attract the *lex loci actus*. The analogy was taken from English municipal law, viz. from a decision of Sargant, J.,[14] according to which a will was capable of operating as a soldier's will only if the testator intended to avail himself of the special privilege of the *testamentum militare*. Even if it be true that, under the Wills Act, 1837, a gift to an attesting witness in a soldier's will can be upheld only upon proof that the testator meant the document to operate as a military will, there would seem to be no common denominator between this purely municipal question and the general problem of the nature of *locus regit actum* with which the decision was concerned.

Some importance was attached to the fact that "real estate" was mentioned in the will, and that, if there had been any realty among the testator's assets, Lord Kingsdown's Act would have had no influence upon its distribution. It is difficult to see why these circumstances should have been allowed to impress the judge's mind. The testator's English domicile would have been as irrelevant to the formal validity of a will of realty as the Scottish *lex actus*. Could it have been seriously contended that a will drawn up in compliance with the formalities required by Scots law would not have operated so as to dispose of Scottish freehold land, only because it happened to be attested by two witnesses?

Like so many other decisions, this judgment reveals a somewhat unfortunate tendency to reduce objective rules of law to matters of "intention." The "presumed" or "implied" intention of the parties is often made the covering shield behind which judges make what is in fact new law, a phenomenon particularly prominent in the law of contract, especially in the law of "frustration" and "impossibility." In the present case, however, the judge went further, and wrapped into the cloak of "intention" not a new rule of judge-made law, but an old principle going back to the time of the Postglossators, and a statute which was never intended to operate with reference to the party's state of mind.

From a practical point of view the decision is as important as it is deplorable. It runs counter to the general idea of *favor testamenti*, and it robs Lord Kingsdown's Act of much of its effectiveness. It also places serious obstacles in the way of those whose lot it is to advise testators with foreign connections. Any lawyer who has ever drafted a will for a testator whose domicile was doubtful or did not coincide with his nationality, who had assets in a number of countries, etc., knows that, as regards form, the safest course is to tell the client: "Let us try to observe the formalities of all systems which might have a possible bearing upon your estate." It would be unfortunate if an attempt to comply with

[14] In *Re Limond*, [1915] 2 Ch. 240.

the form of one country, say England, made the simultaneous use of that of another system, say Scots law, nugatory. If the instant decision is good law, draftsmen might be well advised to insert into such wills a clause expressing the testator's intention to observe all the potentially relevant legal systems.

O. KAHN-FREUND.

Where is a Tort Committed?

It is a matter of surprise that the question where—for the purposes of the conflict of laws—a tort has been committed, does not seem to have engaged the attention of any English Court, until the case of *George Monro, Ltd.* v. *American Cuanamid and Chemical Corporation*, [1944] 1 All E.R. 386, came before the Court of Appeal. Both in continental Europe and in the United States this question has been much discussed in courts of law and by learned writers.

Where the problem arises as one of the choice of law, i.e. because the defendant pleads that his act was "justifiable" under the *lex loci delicti commissi*, the question is not one of classification but of what Dean Falconbridge[1] calls the "selection of the proper law," more particularly of the "selection of the connecting factor," akin to the proper determination of the domicil, the definition of what is the place where a contract was made or to be performed, etc.

In the case under review the problem arose in a different way. R.S.C. Order XI, r. 1 (*ee*) empowers the Court to grant leave to serve notice of the writ out of the jurisdiction, "where the action is founded on a tort committed within the jurisdiction." An English company had bought certain chemicals from an American corporation under a contract which provided that property in the goods was to pass in New York, and that the law of New York State was to govern the transaction. Having been made liable by their customers (or their customers' customers) on the ground that the chemicals had proved to be injurious, the English company desired to sue the American corporation for damages in an English Court. They found it difficult to bring their case under R.S.C. Order XI r. 1 (*e*), since the contract was made in America, governed by New York law, to be performed and, apparently, broken[2] in New York. They thus decided to frame their action in negligence, alleging that, since the damage had occurred in England, the tort was committed within the jurisdiction.

The Court of Appeal decided the case against the English company, and the order giving leave to serve notice of the writ in America was set aside. The three Lords Justices, Scott, Goddard, and du Parcq, L.JJ., were unanimously of the opinion that this was not a case in which the Court should exercise its discretionary jurisdiction, and du Parcq, L.J., again reminded the Masters (who now deal with such applications in the first instance) of the well-known principles governing the use of the powers enjoyed by the Court under Order XI, and of the necessity for very great caution in the exercise of this jurisdiction.

But while Scott, L.J., based his judgment entirely on this point and

[1] L.Q.R., vol. 53, p. 547

[2] Goddard, L.J., at p. 388, concluded from the fact that property had passed in New York that the contract was broken there, but, with respect, a contract of sale may be broken in a place different from that in which property passes, e.g. if goods delivered under an f.o.b. contract are not in accordance with description or sample.

refused to express an opinion on the question whether—apart from the Court's discretion—rule 1 (*ee*) applied at all, both Goddard, L.J., and du Parcq, L.J., came to the conclusion that no tort had been committed in England. Goddard, L.J., was satisfied that "a tort committed within the jurisdiction" was equivalent to "a tortious act committed within the jurisdiction." And du Parcq, L.J., put the problem in a nutshell: "The question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, *even though damage may be of the gist of the action.*"

That any given tort may be of a composite character, is obvious. The facts which constitute the composite entity may have occurred in any number of different jurisdictions. This is true not only where, as in negligence or in conspiracy, damage is of the gist of the action. It is also true where, as, e.g. in libel (according to English municipal law), *iniuria sine damno* is actionable. A libellous letter may have been written in one country, addressed to another, and read in a third country. The antithesis: "doing of the wrongful act"—"suffering of the damage" does not exhaust the possibilities of conflicts of laws arising from a competition of various legal systems for the regulation of tortious liability where events which happened in more than one country or state are all indispensable to complete the set of facts required as the basis of a claim for damages. The judgments in the case under review, therefore, are only a modest contribution towards the solution of a fundamental problem of Private International Law. They exclude one type of solution—the adoption of suffering of the damage as the relevant factor connecting tort liability with a system of law—but they do not provide a positive answer to the question: Apart from the place where the damage has occurred, which of many possible countries where one of the elements of a tort was realised should be the one whose law governs the case?

In the United States this question has received frequent attention both from Federal and from State courts. It seems that one of the problems which has given rise to a certain amount of controversy is the rivalry between the law of the State in which the injurious act was committed and that of the State in which the injurious effect was produced. That the latter system is not identical with the law of the country where the damage occurred is obvious: If the trigger of a gun is pulled in Barbaria, a man is hit across the border in Utopia, and taken to hospital in Arcadia where he dies, it is only the law of Arcadia, not that of Utopia which is excluded by the judgments in the case under review. There remains the choice between Barbaria and Utopia, and it would appear that, upon the whole, American Courts prefer to regard the place where the injury occurred as relevant rather than the place where the chain of causation was first set in motion. The judgment of Brandeis, J., in *Young* v. *Masci*[3] seems to express a principle commonly accepted by the Courts. "A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury. . . . The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it." Thus, the law of Oklahoma was applied by a Kansas court where the owner of a farm in Oklahoma had suffered damage from a fire caused by sparks from an engine travelling on Kansas territory.[4] An

[3] (1933) 289 U.S. 253.

[4] *Otey* v. *Midland Valley R. Co.*, 108 Kan. 755.

Alabama court held that the law of Mississippi governed the liability of a railway company to one of its employees injured in an accident which occurred in the latter state owing to a defect which ought to have been remedied in Alabama.[5] The Supreme Court of Pennsylvania decided that the owner of a motor car who sets out on a trip from Pennsylvania to Ohio is liable according to the law of Ohio for the consequences of an accident occurring in that State though the cause of the accident was a defect in a tyre which should have been repaired in Pennsylvania.[6]

The Restatement (s. 377) purports to express the effect of decisons such as these in the terse formula: "The place of wrong is in the State where the last event necessary to make an action liable for an alleged tort takes place." Since, in the case of torts such as negligence, nuisance, conspiracy, etc., the occurrence of damage is an "event necessary to make an actor liable," it is clear that, according to the decision under review, a rule such as that formulated in the Restatement does not form part of English Private International Law. Nevertheless, it is quite possible that, in cases such as those mentioned above, an English Court might, like many American judges, arrive at the conclusion that, in the words of the Chief Justice of Pennsylvania, "the place of wrong is, and the tort must be deemed to arise, where the injury is inflicted, not where the negligent acts leading to it were committed."

O. Kahn-Freund.

REVIEWS

LIBERTY AND LEARNING. By David Edison Bunting. pp. 147. Washington, D.C. American Council on Public Affairs. **$2.50.**

This is a useful account of the work done for academic freedom in the U.S.A. by the American Civil Liberty Union from its inception in 1917 until the years of the present war. A preliminary chapter is devoted to a general account of the foundation and development of the Union. After which the book is concerned with its work in the academic field where, since its setting up in 1924 of a Committee on Academic Freedom largely composed of university teachers, it has worked principally through that committee. Among its members are some distinguished jurists, such as Karl N. Llewellyn and Morris R. Cohen.

The set up in the U.S.A., with its numerous State universities, the dependence of higher education upon charitable gifts, and the closer political control of school education, is such as to make the problem of academic freedom much more acute than it has been at any time in this country. Teachers have been dismissed and students sent down for professing unpopular minority views. The Civil Liberty Union has fought their battles in the Courts or in the Press. No detailed account of the legal aspect of their troubles is given in these pages, for the volume is intended for the general reader. Such success as has been achieved, and it is notable, has, however, been won through the Press and not through the Courts, for every case so far taken appears to have been lost: from the *Tennessee Evolution Case* (John Thomas Scopes) to that of *Hering* v.

[5] *Alabama G.S.R. Co.* v. *Carroll*, 97 Ala. 126.
[6] *Mike* v. *Lian*, 322 Pa. 353.

State Board of New Jersey, in which the Supreme Court in 1940 upheld the right of State Legislature to enact laws compelling schoolchildren to salute the flag. In this case it is disappointing to find Justice Frankfurter delivering a judgment which the author in a striking footnote compares with a German judgment on the same subject in 1937. By a malicious stroke of historical irony Frankfurter was formerly a member of the Union's Committee on Academic Freedom.

There is a great deal of interesting matter in this book; not the least being the struggle which has evidently gone on among the leaders of the Union about Communism. Perhaps the fundamental problem of the Union, as it has been of the National Council of Civil Liberties in this country, has been whether to support the freedom of speech and action of a political party which boasts that its first use of power would be the establishment of a dictatorship. Neither body has faced the problem successfully. Both grew out of a sentimental liberalism, and the American Union for long upheld the rights of speech and action both of Communists and Fascists. Eventually in 1940 the Union expelled from its governing committees members of political organisations supporting totalitarian dictatorship. It did not bar membership to Communists nor did it become "any less zealous in the defence of Communists' rights." Whether a Fascist is eligible for membership is not made clear. As the membership appears to be composed almost entirely of Socialists and democrats, there is perhaps no danger of an application from any such source.

To an English reader unfamiliar with the pervasive influence of the "spoils system" it will come as a surprise that the Union does not regard a case of plain victimisation in connection with straight party politics as coming within its province at all: "When its local correspondent reported the dismissal of twenty-two employees of the Mississippi A. and M. College in 1930 as "simply the result of how he or she voted in the last election, the Union lost interest in the matter," but if one of them had been dismissed for teaching Communism there would have been a real flare up!

R. S. T. C.

AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS. Second Edition, revised and partly rewritten, by H. Potter. London. Sweet & Maxwell, Ltd. 1943. pp. x and 588. **25s.**

The issue, in to-day's conditions of war-time stringency, of a new edition of Professor Potter's textbook, is sufficient testimony to its success in meeting the need which he set himself to supply. He tells us, in his preface, that the work has been revised throughout, some parts being entirely rewritten and others wholly new. The new edition incorporates at many points "elementary facts of social and economic growth, introduced as the background upon which the judges framed their rules": and further, we have a new chapter on the Forms of Action, a new section on Innominate Torts, and a considerable enlargement of the chapter on Contract. The chapter on Procedure has been remodelled, and there has been some cutting of sections explaining antiquities in such matters as tenures, property actions, and seisin, as contribute little to the understanding of modern legal doctrine. The result is almost a new book, much larger and more obviously broad-based, and explicitly responding to present tendencies to treat the subject in a humane rather than in a narrowly technical

spirit, as the author himself proclaims in his eloquent and stimulating introductory chapter. He states that only the history of the English legal system will afford a satisfactory angle for the explanation of its basic foundations to-day: his book justifies that standpoint.

The Editor of this journal has entrusted the reviewing of this new edition to a layman—a constitutional and administrative historian whose studies have been mainly in the central period of the Middle Ages, when so much of the foundation of the English legal system was laid. For this reviewer to praise Professor Potter's legal scholarship would be mere impertinence, and in any case the reputation of the book is already established. But at least a layman may admire the skill displayed in proportioning the various sections, the astonishing feat of compression, the general clarity of exposition and narrative, and the interest by which the author lightens what might so easily have become a heavy burden of factual statement. His comments on the significance of his material would illuminate the studies of students in our Honours Schools of History no less than those of the young lawyer, for here are many of the stones which form the very fabric of English government and administration. Occasionally we encounter phrases and sentences where the need for compression has apparently compelled the sacrifice of clarity to concise technical accuracy; and frequently so much meaning has been condensed into a single sentence that it needs careful pondering before its full load is discharged; but this last quality is not without its advantages in a student's textbook.

What, then, may a historian say on the matter of a textbook of legal history written by a legal historian for young lawyers? Law is so essentially part of the fabric of history that such a work as this inevitably challenges a student of the history of English government to compare the teaching here provided with his own general ideas and accepted beliefs. Differences of standpoint, emphasis, and purpose impress themselves at once, and the readers of a Law review will perhaps pardon a layman for commenting upon some of them. The handling of the large section on the history of judicial institutions, carried out in a way quite different from that of the constitutional historians, and with very different results, illustrates one striking difference: the lawyer looks back towards origins from the standpoint of the present, the historian looks forward from the beginnings towards the present stages reached. Professor Potter, seeking to explain the variety of courts and the conflict of jurisdictions which had come into being before the reforms of last century, analyses and minutely subdivides developments in a way which, to a historian, carries back their conflicts and their overlapping to the point of origin itself, emphasising differences where the historian is accustomed to see one common origin in the idea of the King in his Council as the never-failing fount of justice, source of remedies, and parent stock of a succession of courts throughout the period of growth from 1100 onwards. Common Law Courts, Conciliar Jurisdiction, Star Chamber, Courts of Request, Chancery, and the jurisdiction of the House of Lords are all the outcome of that fundamental fact in medieval English history, that all executive power, whether judicial or in any other branch of the administration, lies in the King's hands and is directed by him in his Council, of which these various courts and jurisdictions, like the administrative departments of State, are but the varying outgrowths, produced by different needs in different times. Of course, Professor Potter, as his text shows, is aware of this fundamental fact: but the difference

of outlook and treatment produces an impression strikingly different from that which a lay historian would generally seek to convey.

More disturbing is the impression that legal history too often snatches some single fact from its historical context, attaches to it a significance which the lay historian does not recognise, and works it into the fabric of accepted teaching with a meaning which, to the historian, seems quite wrong. One example must suffice to illustrate this general question. Professor Potter tells us, at several points, that in the Provisions of Oxford of 1258 the baronial reformers "remembered their dislike for the royal writs issued without the leave of the Great Council," and prohibited the issue of such writs "to give a remedy in a case where there was not already a writ in common form"; and although he duly notes the objections of Professor Plucknett and others, he says that this decree was probably a principal cause of the drying up of the stream of new writs which had issued from the Chancery hitherto. Actually, the two passages in the Provisions of Oxford make no reference to remedies or to lawsuits, and the reformers who framed them had no intention of meddling with the provision of legal remedies. The "writs, other than writs *de cursu*" which they decreed should not be issued without the consent of the Council (incidentally, not the Great Council, but the newly constituted Privy Council of Fifteen), were not specifically or intentionally legal writs, but simply any type of letter whatsoever which the Chancery might issue under the Great Seal on matters of public business—diplomatic, political, fiscal, administrative, or any other matters generally. The Chancery, as "secretariat of State for all departments," still drafted, sealed, and issued all letters emanating from the King on public matters (save in exceptional circumstances), and legal writs were merely one part—though a bulky part—of its work. The barons were determined that, apart from routine correspondence (legal and other routine administration), every letter under the Great Seal must have the approval of the new Privy Council which they had instituted to take charge of the entire government. Admittedly legal writs were included in this edict (though not specifically), but far from disliking the growth of new writs the barons, in their Petition of 1258, actually demanded new legal remedies in certain cases where the Common Law was defective, while in the debates of their Council of Fifteen we hear them proposing that if the writ of *mort d'ancestor*, the writ of entry, or other established writs will not meet the case, a new writ should be provided: they even provide a specimen draft. If the cessation of the stream of new writs occurs soon after 1258, the reason is not the Provisions of Oxford (whlch were in any case wholly invalidated by the Dictum of Kenilworth in 1266) nor in baronial hostility to the Chancery's inventiveness; the explanation must be sought elsewhere.

This one example must suffice, though others might be cited, of an attitude of mind towards history to which legal historians seem often prone. History is not an armoury of precedents; it is a complex and continuous process, as Professor Potter himself so well proclaims, and if a full synthesis of legal and historical studies is ever to be achieved, legal history must be written with a knowledge of history equal to that of law. To cite Holdsworth is to draw, not on a single book or man, but on a library; yet even so there is much more to be assimilated before a history of law can be written as satisfying to the historians as it is to the lawyers.

R. F. Treharne.

GERMANY'S MASTER PLAN. By JOSEPH BORKIN and CHARLES A. WELSH. pp. 154. London. John Long, Ltd.

This book is concerned with the interpenetration of American industry, and, to a lesser extent, of British industry, by the great German cartelised business concerns. It is written by prominent members of the Anti-Trust Division of the U.S. Department of Justice and of the Office of Price Administration, and is therefore based upon a great deal of officially collected information. The penetration was by no means all one way, and the American and British concerns which yielded valuable rights to the Germans obtained useful privileges for their German and Continental trade. Owing to the more advanced stage of German industrial science the Germans obtained a decided advantage in the process of negotiations, and when by means of the Nazi *coup d'état* German industry became subjected to Hitler and his gang these industrial advantages could be, and were, made use of in the political jockeying which led up to the war.

Apart from its general interest, this book is a fascinating study from the legal point of view. It shows, for example, how the Germans made use of their own system of patent law to prevent foreign inventors from getting a footing in Germany, and at the same time made use of patents which they were able to take out in Britain " to kill the British chemical industry." "The first British compulsory licence law (for the granting of patents) was directed against this practice of the Germans." It seems obvious that the only really satisfactory solution of this problem is the establishment of an international system of patents under an International Office controlled by some institution like the League of Nations.

Even more fascinating and ominous is the account of the agreement between I. G. Farben, Imperial Chemicals, and Du Ponts and Allied Chemical and Dye in the U.S.A., to parcel out the chemical industry of the world. It was never quite completed, but considerable progress was made. The authors are not concerned with the precise form of the contracts entered into, but it is obvious that the greatest legal skill and ingenuity must have gone into their framing. It is clear that from time to time the draftsmen were much worried by U.S. Anti-trust Legislation, but the common law of England does not appear to have interfered with their beauty sleep.

Another series of agreements was designed to keep the arrangement in suspended animation during the war. These the common law is more likely to hit, but given goodwill among the industrialists concerned it is obvious that there is no practical difficulty in their returning to their little games after the war—that is, of course, so long as civilised communities are prepared to submit to industrial domination by international monopoly interests of this type.

The weakness of the volume is its rhetorical style, and generally speaking an absence of any detailed account of the agreements referred to —here and there there is a valuable exception, however, as in the case of the licence for the production of artificial rubber granted to Standard Oil by I. G. Farben, the object of which was to prevent the manufacture of rubber from coal in the U.S.A. R. S. T. C.

WHERE TO LOOK FOR YOUR LAW. Eighth Edition by R. HILARY STEVENS. London: Stevens & Sons, 1944. 254 pp. **2s. 6d.** net. Interleaved. **5s.**

The appearance of a new edition of this handy legal bibliography

within less than a year of its predecessor is evidence of the undoubted success of the reforms introduced by Mr. Stevens in the previous edition, as well as of a growing demand for this type of guide. The book has been carefully revised and many suggestions received from readers of the seventh edition have been adopted with advantage. Thus the title "English Law" in the subject index was previously somewhat overloaded and confusing. By transferring all works on Legal History to a new title of that name, a more helpful and logical arrangement of the material has been achieved. It may, of course, be objected that a title "English Law" should be unnecessary in a bibliography of English Law. Its inclusion, however, can be defended as securing a place for encyclopædic publications and works of a general character, which it would otherwise be difficult to classify. A marked improvement is likewise discernible in the arrangement of the title "Constitutional Law" where a definite division between law and history has been established and a new sub-title, "Constitutional Documents," has been introduced.

The section on Foreign Law has been re-cast and is now styled "Dominion, Colonial and Foreign Law," comprising two main titles, "Dominions and Colonies" and "Foreign Law." Under the former, general works are listed, whilst books on the laws of the individual dominions and colonies appear under the title "Foreign Law." This may be strictly correct if "foreign law" is interpreted in the sense our courts interpret it, but the arrangement is apt to cause confusion and the reader will more probably be influenced by the geographical rather than the legal connotation. Under "Italy," we note the absence of any mention of Dr. Binchy's masterly work on *Church and State in Fascist Italy*, published under the auspices of the Royal Institute of International Affairs, which will long remain an invaluable source book for all studies on this question.

We note with satisfaction a notable increase in the number of American books listed under a variety of titles, and details of the various *Restatements* are now given for the first time.

Some idea of the expansion achieved can be gathered from the fact that this edition contains fifty-four more pages than its predecessor. This is a testimony to the industry of the Editor in his endeavours to make the book as complete and useful as possible. Nevertheless in a publication of this type there is always room for improvement. For instance, there does not appear to be uniformity in the matter of giving dates of publication of books. Taking pages 64 and 65 at random, we find the date omitted in nine cases on each of these pages. We think the date of publication, whenever known, should always be given.

Then there is the problem of books out of print. A note at the beginning of the List of Subjects informs us that "books marked O.P., are included for completeness of reference. They do not appear in the List of Authors." Turning to the List of Authors we find a number of books are shown as being O.P., yet these same books when appearing in the List of Subjects are not marked O.P. Here again a greater degree of uniformity seems desirable.

Finally, would it be too much to ask that fuller bibliographical data should be given about each book, in some future edition? We recognise that under the present stringent control of paper this is a reform which may have to await more spacious days, but it would be a distinct advantage for the reader to be able to glean at a glance the format, number of pages, type of binding, name of the publishers, etc., of each book. We warmly commend the suggestion to the Editor.

In making the foregoing observations we do not wish to detract from the essential usefulness of the book in its present state, and we are thankful to Mr. Stevens for making this first serious attempt at a systematic classification of the considerable mass of contemporary legal literature and for presenting it in a highly attractive form and at a reasonable price.

A. CARRERAS.

WHEATON'S INTERNATIONAL LAW. By A. BERRIEDALE KEITH. Seventh English Edition. Vol. 2, "War," 1944. Stevens & Sons. pp. 672. Price **50s.** net.

THE INTERNATIONAL LAW OF THE SEA. By A. PEARCE HIGGINS and C. JOHN COLOMBOS. 1943. Longmans, Green & Co. pp. 647. Price **42s.** net.

THE LAW OF NEUTRALITY. By S. N. GRANT-BAILEY. 1944. Stevens & Sons. pp. 56. **5s.** net.

World crisis and war have not substantially affected the output of learned literature on International Law. This output is overwhelmingly on orthodox lines. Textbooks and articles, on the whole, prefer to regard the war and the events that preceded it, as a temporary intrusion, supplying, here and there, a new case or precedent and illustrating, to a painful degree, the lawlessness of some members of the family of nations. The deeper impact of new social and political conditions on the foundations of International Law is either ignored or brushed aside by the majority of writers.

Of the three books under review, Professor Keith's edition of Wheaton goes furthest in this direction. In his preface, the learned editor states that "the present war has added to the mass of information, but has not materially altered the treatment, and hence it has been possible and advisable to re-issue Volume 2 on War, while the contest is still raging." Professor Keith takes a different view about the law of peace, which he regards as being more deeply affected. Unfortunately, his untimely death has intervened to prevent him from undertaking the bigger task of restating the law of peace at a later date.

The present volume is, therefore, essentially nothing but a slightly revised version of the last edition of 1928. New cases like those of the *Altmark* and the *Asama Maru* are mentioned. On the former, Professor Keith is content to observe "the action of the British Government was on the whole approved." On such problems as the role of aircraft in modern war, some facts of the present war are briefly cited, but a discussion of the legal problems involved, which would probably have led to a questioning of many of the foundations of the rules as existing in maritime warfare or proposed in the Hague Draft, is avoided. It is surprising that, in a discussion on Insurgents in War, the Spanish Civil War and such cases as the Arantzatzu Mendi are not even mentioned.

The present reviewer has repeatedly stated his belief that, even at the present stage of developments, it is impossible to ignore such fundamental factors in the law of war and neutrality as the vastly and universally increased responsibilities of the State, which directly affect many rules, or the question of military and non-military objectives in modern total warfare. In this connection, the Spanish Non-Intervention Pact, for example, should be discussed in every textbook, as it proves the inapplicability of the customary rules. Many new developments, such as Lend-Lease, are briefly mentioned but not discussed from a legal point of view.

They are, however, capable of such discussion. (*Cf.*, for example, Schwarzenberger, International Law and Totalitarian Lawlessness, p. 50 *et seq.*) The new edition of Wheaton must, therefore, be regarded as an interim revision.

The late Professor Pearce Higgins and Dr. Colombos have produced a compendium of even wider scope than the title suggests; for a full chapter is devoted to the law of rivers. It is a book of careful and meticulous scholarship, in which every important convention, draft, case, is at least briefly noted and commented upon. The book is divided into two principal parts, dealing with War and Peace respectively, and the second part is, among others, a textbook on the most important parts of the law of neutrality. The account and analysis is objective and detached, and the emphasis of the whole book in view of the material at hand, is naturally on the past. But occasionally the learned authors allow themselves brief observations which really question the applicability of the whole vast amount of previously treated material to present conditions. Thus, on p. 494, it is stated that "there is now hardly a commodity which cannot be claimed to be useful in warfare, and hardly any trade which, in the modern sense, does not influence the carrying on and furtherance of the war, and, either economically or militarily, is not conducive to the advantage of one belligerent and the consequent disadvantage of his opponent." This and other recent developments are noted coolly and dispassionately. Only in a final chapter on "The Future of Naval Warfare" does Dr. Colombos venture to give a brief but coherent statement of his views on the trend of present and future developments. Some of them have no particular relation to the subject matter of the book and state the need for a legally organized international society. But in a stimulating short section on "The Realities of Naval Warfare," the imperative need for international lawyers to test the legal rules unceasingly by the realities of new developments and changes in the factual conditions underlying them is clearly stressed. It is a pity that this is only by way of postscript, and that the book as a whole, a book of great learning and scholarship, should have been almost entirely devoted to a restatement of rules which no longer correspond to modern conditions and are, in fact, history, instead of elaborating, at least tentatively, the legal implications of modern changes in naval commerce and warfare and in the social structure of states.

Mr. Grant-Bailey's little book of 50 pp. is avowedly a primer, but it is certainly a very good one. The branches and problems of the law of neutrality are clearly and concisely set out, and no important case, including the most recent ones, seems to have been missed. Occasionally there are brief but illuminating observations on new problems, such as those (on p. 5) on the legal impact of "the invasion by the State of the field of private enterprise in commerce, manufacture, transport, etc." For a quick recapitulation of the law of neutrality by the advanced student, this little book can be warmly recommended.

W. Friedmann.

ELEMENTS OF CONVEYANCING (with Precedents). Seventh Edition by John F. R. Burnett, *of Gray's Inn, Barrister-at-Law.* London: Sweet & Maxwell, Ltd., 1944. pp. xxviii and 353 and (index) 31 pp. **27s. 6d.** net.

Burnett is well known as one of the best of the practical textbooks for students. For the Bar Final, indeed, it justly holds a virtual monopoly.

One of the most noteworthy features of the book is its almost unerring touch in deciding when to quote, when to paraphrase and when to give examples. Authors who indulge in a bare series of quotations from statutes interspersed with brief statements of decided cases no doubt minimise the risk of mistakes, but their books are of little use to students who have to wrestle with a complicated subject such as conveyancing. Unless the meaning is obvious, students want the statute paraphrased or explained, and often an example, before seeing the light. *Burnett* is lucidity itself, clothed with a pleasant and readable style and embellished with a generous but not excessive use of italics for emphasis. A competitor that could oust *Burnett* from its present position would indeed be a remarkable book.

Apart from the omission of some ancient precedents, this carefully edited new edition differs little from the last. The only omissions of any import seem to be *Banks* v. *Ripley*, [1940 Ch. 719 from p. 120 (rectification of a settlement made without proper words of limitation), *Taylor* v. *Webb*, [1937] 2 K.B. 283 from p. 140 (especially in view of the exception of fair wear and tear in the precedent of a tenancy agreement on p. 318, a precedent which, incidentally, ignores the advice on p. 146 about including the words "whether legally demanded or not" in relation to rent in a forfeiture clause), and the reduction of the period for ancient deeds from thirty years to twenty by the Evidence Act, 1938, sect. 4, from p. 82. The reason for including the provisos added to the precedents of registered transfers on pp. 339–342 will not be apparent to most students, and some indication of it should have been given, even if only a bare reference to 3 *K. & E.* (14th ed., 1940), 128, 129, 422. Some other imperfections, most of which have been carried over from the last edition, might with advantage have their careers terminated in the next. Thus p. 12 may suggest that overreaching was an invention of the 1925 legislation, an omitted "and" eight lines from the bottom of p. 191 may puzzle some, and it would be safer on p. 80, instead of saying that a specific devise is a good root of title, to say that it may be. On p. 286 it is said that on a first registration the only overriding interest of which the Registrar is bound to enter a notice is an easement created by an instrument; in fact, easements are in no different case from any other "right, privilege or benefit" (e.g. a lease), and the entry of a notice is in all cases discretionary; see Land Registration Act, 1925, sect. 70 (2); Land Registration Rules, 1925, rule 41; *Brickdale and Stewart Wallace* (4th ed., 1939), p. 195. *Re Barrat*, [1929] 1 Ch. 336 is authority for deleting the word "life" thirteen lines from the bottom of p. 198, and at the present rate of progress "177 T.L.R." and "181 L.T." on pp. 142, 278 will not be reached until 2061 and 1949 respectively. The dating of the numerous undated cases would be welcome, too. But these few defects matter little to students; to them and to those whose knowledge of conveyancing has been dulled by years of war service, the new *Burnett* will appear in its accustomed light as a clear, accurate and helpful guide. Publishers and printers have joined in maintaining a high standard of book production, and may justly claim to stand on the stage with the author (no doubt a little to his rear) to receive the congratulations that are undoubtedly due to all concerned on this successful new edition.

R. E. Megarry.

THE POLICY OF NEUTRALITY AND THE PRACTICAL ALTERNATIVE. By A. J. Jacobs. Cape Times, Ltd. 1943.

The thesis of this interesting essay is, firstly, that modern developments

have made the policy of neutrality out of date, and, secondly, that the organisation of peace among the nations does not depend on the "wholly mistaken assumption that each nation must surrender in advance its freedom to decide what action (if any) it will take when peace is endangered."

The first thesis will now command widespread support though a lot of work remains to be done on the question how far neutrality is altogether incapable of survival and how far the particular law of neutrality developed in previous centuries needs changing in the light of decisively altered social and economic conditions. The present reviewer remains, however, entirely unconvinced by the author's second thesis. The author bases his contention on several, not always consistent arguments. On one hand he argues that "no community finds it necessary to exact corresponding pledges for its individual members or could safely rely upon them if obtained. Men do not surrender the right to do as they please. The community simply deprives them of the power to do as they please if what they please to do is injurious to other members." I fail to see what practical and even theoretical right to disturb the peace this distinction (whose hollowness would be at once revealed by a study of Hohfeld's analysis of legal concepts) would leave to an individual. On the other hand, Mr. Jacob argues that "experience suggests that, without pledging themselves in advance, powerful nations should act in voluntary co-operation, as individuals do in similar circumstances, by facing a would-be aggressor with the certainty of armed resistance too strong to make the aggression worth while." Quite apart from the contradiction contained in this sentence the calamitous experience of the period between the two wars suggests the very opposite. If another catastrophe is to be avoided, it is vital that spurious formulas of national sovereignty, freedom of decision, and constitutional reservations should not once again frustrate the plain requirements of an organised peace, which is that commitments should be clearly defined and the power to back them organised.

W. Friedmann.

JACOBS ON BILLS OF EXCHANGE, CHEQUES, PROMISSORY NOTES, ETC. Fourth edition by the Author. pp. xv and 320. London, 1944. Sweet & Maxwell, Ltd. **21s.** net.

We are glad to welcome a new edition of this excellent textbook. It is much the most satisfactory of the textbooks on this subject from a student's point of view, the larger volumes such as those by Chalmers and Byles being much too difficult. Moreover, Mr. Jacobs has not succumbed to the temptation to bring out very frequent new editions so that he has had a substantial amount of new and important case law to add. He has done his work with his usual thoroughness and care.

This subject is one of particular difficulty for a reader unacquainted with the practical handling of negotiable securities, and one of the most valuable features of Mr. Jacobs's treatment of the subject is the abundant illustrative diagrams he provides. In his first edition he provided a useful digest of illustrative decisions which was unfortunately dropped, but in this edition we are given the text of the Bills of Exchange Act, 1882, which is a valuable improvement. There is also a short appendix on the emergency legislation which during the war years is of great practical importance.

R. S. T. C.

MODERN EQUITY. Third edition, 1943, by HAROLD GREVILLE HANBURY, D.C.L., M.A. Stevens & Sons, Ltd. **37s. 6d.**

No textbook on equity has had its merits and demerits so keenly discussed as this one. The new edition is not likely to lead to any re-consideration of the judgments which have been passed on the previous editions. There have been no drastic alterations. It is not one of those legal textbooks which in each succeeding edition incorporates, as a matter of routine, the suggestions of critics and reviewers so that, as the years pass, many besides the original author leave their mark on its pages. *Hanbury's Equity* has not lost in individuality in this way nor has it gained in strength. Statute law in the shape of the Inheritance (Family Provision) Act, 1938, and the Limitation Act, 1939, have led to substantial alterations in the text, but the new case-law, with the exception of *Knightsbridge Estates Trust* v. *Byrne* (1940, A.C. 613), and a few other decisions, has been merely cited in footnotes. The extensive citation of periodical literature which was a feature of the first edition has not been kept up to date. We look in vain for reference to many important articles.

The appearance of three editions within nine years shows that the novel emphasis and treatment given to the exposition of equity which came as a surprise in 1935 have not lost the favour of an academic public. For example, the author devotes a special chapter to the maxim "Equity will not Assist a Volunteer," and says (pp. 146, 147) that it "is really the most important of all equitable maxims, and yet it is not usually to be found in lists which follow the traditional treatment of the subject." But among the exceptions to this maxim we do not find mentioned that of the *donatio mortis causa* unsupported by a common law transfer although equity's interference in such a case has been clearly based, at least since the time of Lord Eldon, on an exception to the general principle. The law of charitable trusts has been rendered in an impressionist manner which may be not uncongenial to the amorphous subject-matter. But however effective such treatment of charities may be in the lecture room it is hardly appropriate in a textbook. At pages 153 and 154 the distinction between the *cy-près* doctrine and the direction of a scheme is not made clear; indeed it is confused and *Moggridge* v. *Thackwell* is put forward as an example of the execution of a trust *cy-près*. And on page 159 the "two favours shown by equity to charitable trusts" ignore what is perhaps the oldest favour and which is as important as the two which are mentioned, viz. the non-failure of a charitable trust on the ground of uncertainty. This favour operates by the ordering of a scheme.

War legislation has not been incorporated in the text but relegated to an appendix in which the statutes and cases on them "are discussed as briefly as possible." Since the last edition the text has been slightly shortened and the index shortened and improved.

W. H. D. WINDER.

POLLOCK ON THE LAW OF PARTNERSHIP. Fourteenth edition by J. W. C. TURNER. pp. xviii and 228. London, 1944. Stevens & Sons, Ltd. **15s.** net.

STRAHAN AND OLDHAM ON PARTNERSHIP. Sixth edition by H. G. HANBURY. pp. xvi and 141. London, 1944. Sweet & Maxwell, Ltd. **12s. 6d.** net.

These are routine editions of established works. Each editor is well

known as an authority on matters of equity. Neither has been taxed by any new statutes, or, indeed, by numerous or epoch-making cases. What little they have had to do they have done well, but substantially each volume remains as it was. Strahan is perhaps the more suitable of the two for a budding student. Pollock, who, after all, drafted the Partnership Act, 1890, speaks with the greater authority, and will appeal to a more advanced type of student and to the practitioner.

R. S. T. C.

PUBLICATIONS RECEIVED

SYMPOSIUM in Honour of the Sixtieth Birthday of Dr. E. Beneš, President of the Czechoslovak Republic. Published in Czech by the Association of Czechoslovak Advocates Abroad. Edited by DR. EGON SCHWELB. Price **4s.**

THE FUTURE DEVELOPMENT OF INTERNATIONAL LAW. By F. N. KEEN, *Barrister-at-Law.* Grotius Society, 1943.

THE PROBLEM OF STATELESSNESS. By P. WEIS, Dr.Jur., and R. GRAUPNER, LL.B. Published by the British Section of the World Jewish Congress. Price **2s.**

CORRECTION PLEASE! Published by Corrective Research (Los Angeles). 1943. **$3.50.**

TRIBUNALS FOR CONSCIENTIOUS OBJECTORS AND ADMINISTRATIVE LAW. By R. S. W. POLLARD. Published in *Public Administration,* Vol. XXII, No. 2. Journal of the Institute of Public Administration. Price **4s.**

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